

Authorities to Use US Military Force Since the Passage of the 1973 War Powers Resolution

A Monograph

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Abstract

Authorities to Use US Military Force Since the Passage of the 1973 War Powers Resolution, LTC
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Why does the United States not wage war as it did during World War II? Understanding the authorities granted to the branches of the US government is the first step in understanding how the nation employs its military force. An understanding of events after World War II explains why specific legislation changes the manner in which the US government approached global problems that may possibly require the use of military force. This discovery leads us to the next question of how and when is US foreign policy and strategy developed given this new legislation regulating the use of military force. An examination of several military theorists, the US Constitution and US history paints a picture of two branches of the US government attempting use their authorities to provide military force, in order to solve global crises. Those uses of force examined took place after the 1973 War Powers resolution, still occurring without a Congressional declaration of war and with unclear success compared to WWII. What are also unclear are the strategies and policies behind the employment of US force abroad during this time. The conclusion explains who is to blame and the consequences for not considering strategic and policy options available, such as declaring war.

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Acronyms

73WPR	1973 War Powers Resolution
2001 AUMF	2001 Authorization to Use Military Force
2002 AUMF	2002 Authorization to Use Military Force
AECA	Arms Export Control Act
CENTCOM	Central Command HQ
CIA	Central Intelligence Agency
CJCS	Chairman of the Joint Chiefs of Staff
DoD	Departments of Defense
FDR	Franklin Delano Roosevelt
FMLN	Farabundo Martí National Liberation Front
FNLA	National Front for the Liberation of Angola
HR	House Resolution
IRR	Individual Ready Reserve
KIA	Killed In Action
MIA	Missing In Action
MPLA	Popular Movement for the Liberation of Angola
NATO	North Atlantic Treaty Organization
NSC	National Security Council
OCO	Overseas Contingency Operations Transfer Fund
OEF	Operation Enduring Freedom
OIF	Operation Iraqi Freedom
QRF	Quick Reaction Force
RDJTF	Rapid Deployment Joint Task Force
SR	Senate Resolution
USC	US Code
UN	United Nations
UMTSA	Universal Military Training and Service Act
UNITA	National Union for the Total Independence of Angola
UNOSOM	United Nations Operation in Somalia
UNOSOM II	United Nations Operation in Somalia II
WWII	World War II

Introduction

The concept of total war is typically associated with the US Civil War, World War I and World War II. These conflicts dominate the American memory of war, but are seldom the norm in our use of force. It may be argued that if the average American citizen were asked to list their country's wars since the revolution in 1776, most would likely cite the Civil War, the two world wars, perhaps the wars in Korea and Vietnam and, of course, our contemporary wars on terror in Iraq and Afghanistan. Some might even name the War of 1812, the Mexican War, or even the Spanish-American War. If they were told that some of those wars were not total wars but limited wars that took place without a formal declaration of war by the United States government, some might be surprised. Others might dismiss the fact as an unimportant technicality. A war, after all, is a war.

Whether a technicality or not, the concept of limited war and how we become involved in one bears legitimate scrutiny for myriad reasons. None are more compelling than this overriding reality: between the time of George Washington to our modern day war against terror, the US government has deployed military forces one hundred and eighty-seven times.¹ In that timeframe, Congress authorized declarations of war against foreign nations only eleven times. Since 1945, each of the sixty-four situations that triggered an American decision to commit military force could be broadly characterized as limited war situations. Typically, belligerents engage in a limited war under the premise that resolving a provoking incident would not or should not require an expenditure of a nation's total resources. While few would quibble today that US involvement

¹ Barbara Salazar Torreon, *Instances of Use of United States Armed Forces Abroad, 1798-2015* (Washington, DC: Congressional Research Service, 2015), 2-32.

in Korea, Vietnam and the Persian Gulf were not wars, America, since December 1942 has never formally declared war.

In 1973, the US Congress, reflecting its long-festering frustration over the unchecked power of the executive branch to commit military force without consulting them, passed the 1973 War Powers Resolution (73WPR). Its aim was to force the president to seek congressional approval before any commitment of military force to hotspots around the globe. However, given that this law was supported by only one of the two government branches vying for the power to engage the nation in war, the subsequent ineffectiveness of that law should not be a complete surprise. The 73WPR, in fact, seldom has worked the way the legislative branch planned it. On thirteen occasions since 1973, the executive branch found a way to circumvent the law and legally authorize the use of military force.

Ironically, the law actually may have achieved the opposite of its intent. Rather than clarifying the authority for waging war, it muddled it and delayed decisions in protracted Constitutional debate over who had the authority to do what. This monograph explores the use of US military force in the era since the passage of the War Powers Resolution. It seeks to examine the extent to which the War Powers Resolution has influenced both the executive and legislative branches' approaches to the conduct of foreign policy under conditions dependent on the exercise of US military force.

The legislative branch passed the War Powers Resolution over the veto of President Richard Nixon. An additional aim was to improve the legislative branch's influence on foreign policy by providing oversight of the President's authority to use military force. This would ensure the collective judgement of both the legislative and executive branches of the US government was exercised when employing military force in crises abroad. However, the requirements of the 1973 War Powers Resolution caused the legislative and executive branches of the US government to focus on the authorities required to use military force as a means to accomplish foreign policy

objectives, rather than first understanding the nature of war, then determining the prudent foreign policy and the required capabilities to wage war. The author's theory for understanding the nature of war is explained further in Appendix A. To summarize, war equals policy, strategy and the capabilities required for its support.² When determining whether to go to war, the nation must first consider all policy objectives, strategic aims and capabilities necessary to wage and win the type of war identified by the nation. It appears the unintended consequence that the 73WPR limited the policy objectives, strategic aims and capabilities available to the US government because of the resolutions primary focus on the executive branch's authorities to employ the capabilities of military force. Thus, the 73WPR impeded the US government's ability to consider the full range of policy objectives and strategic aims, which comprise the two other components of war, by diverting its attention and judgment to oversight of what authority, gave the executive branch the legitimacy to use military force in crises abroad.

This monograph examines the 73 WPR and the actions taken after its passage by the legislative branch of the US government to reassert itself in US foreign policy. This study examines the development of US legal authorities to employ military force over the forty years since the enactment of the 73 WPR. The legislative and executive branches of the US government are both entrusted with overlapping authorities over the power to develop and execute US foreign policy. In order to understand the friction between the two branches of US government, an examination of the origins of their authorities is required. A brief summary of the roles both played in developing US foreign policy before and after World War II follows. This study concludes with an examination of the legislative branch's focus from 1973 to 2003 on the executive branches authorization to use military force as a mechanism to influence the executive branch's strategies to accomplish its foreign policy objectives on behalf of the nation.

² See Appendix A.

Authorities

The origin of the authority for the US government to use military force was granted to the US government by the people. Initially they were narrowly focused on a decentralized form of democratic government that gave power to individual states and forbade consolidating much authority at the federal level. By 1783, the limited authorizations in the Articles of Confederation to govern the United States made it apparent more authority at the federal level was required to ensure the continued existence of the new democratic republic.

The process to amend the Articles of Confederation created an entirely new form of democratic government explained in broad terms in the US Constitution. This was a change from the Articles of Confederation and there was apprehension and concern that taking authority from the individual states and consolidating it at the federal level would lead the nation down the path of becoming an authoritarian government. The original text of the US Constitution is brief. In a contemporary edition of the *The Federalist Papers*, editor Garry Wills explained the US Constitution, “mandates; it does not explain. It does not enunciate doctrine – there is no mention in it of checks and balances, of separation of powers or judicial reviews.”³ An example of this is the commander in chief clause of the Constitution (Article II Section 2) which the executive branch cites as the authority for the President to issue executive orders authorizing the use of military force. Thus, a quandary exists where the legislative branch claims an oversight role in determining the legality of the executive branches to use military force. Nevertheless, the executive branch maintains its autonomy from interference from the legislative branch in matters of using military force or the development and execution of foreign policy. This brevity of the US Constitution, while creating a resilient form of government, unfortunately created a number of ambiguities regarding responsibilities that we are still clarifying to this day.

³ Garry Wills, “Introduction” in the *Federalist Papers*, ed. Garry Wills (New York: Bantam, 1982), xi.

Alexander Hamilton, James Madison and John Jay wrote a series of articles published in New York City newspapers under pseudonyms in an attempt to educate and persuade the country of the necessity and utility to transition from the Articles of Confederation to the new US Constitution.⁴ Those newspaper articles are known as *The Federalist Papers*. They provide a thorough justification and explanation of the new form of democratic government outlined in the US Constitution. They explain the necessity of the separation of power and checks and balances between the branches of US government, along with explaining the rationale behind authorities entrusted to the branches of the US government. Over time, these arguments were used to defend and explain the framer's intent regarding the Constitution, about authorities resident in the US Constitution. Thus, the arguments made by Hamilton, Madison and Jay in *The Federalist Papers* serve as an authoritative interpretation of the US Constitution.⁵

Federalist Papers number 64, 74, and 75 explain the executive branch usually formulates US foreign policy. The executive branch also leads the development of strategy to accomplish the foreign policy by deciding on the aims and capabilities necessary for its accomplishment. Alexander Hamilton wrote, "Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part of the definition of the executive authority."⁶ The responsibilities for appropriation of funds to build capability, to achieve the aims of US foreign policy objectives are the authority of the legislative branch.

⁴ Garry Wills, "Introduction" in the *Federalist Papers*, ed. Garry Wills (New York: Bantam, 1982), x.

⁵ Garry Wills, "Introduction" in the *Federalist Papers*, xi.

⁶ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Garry Wills (New York: Bantam, 1982) 376-377.

The legislative branch either agrees or disagrees with the executive branch's request by its legislation authorizing, or not, and approving the various capabilities. A few examples of capabilities the legislative branch has authorized or appropriated take the form of ships, fortifications, creation of command and control organizations, and mobilization of national assets. The executive branch has used previously authorized or appropriated capabilities to act on a strategy in order to achieve a goal of foreign policy without having to risk confrontation with the legislative branch. In addition, the executive branch may interpret the need to act on a strategy in the event of state of emergency and require the legislative branch, after the fact to approve its actions.

The authority for these actions taken by the administration are summarized in Section Two, Article Two, the commander in chief clause of the US Constitution. The legislative branch has the option to censor, withhold funds, impeach, second guess, approve the executive branch's actions after the fact or cast blame on the administration unsuccessful attempt at authorizing the use of military force to achieve foreign policy. There lies the major point of friction between the branches of US government and their ability to develop and execute effective foreign policy and accompanying strategy.

The US Constitution grants specified limitations to the authority of the legislative branch. This includes that, the legislative branch "shall pass no money shall be drawn from the treasury, but in consequence of appropriations made by law." It is important to understand how the US government can employ the necessary capacity of its resources to effectively wage war. The legislative branch employs the unique authority of the "power of the purse," better known as appropriations. This along with its responsibility to make the nation's public laws become instrumental in understanding the authority of the executive branch and how capabilities are generated in order to pursue US foreign policy objectives. Thus, the legislative branch authorizes all appropriations for military capability under US Public Law. Thereafter, those authorized and

appropriated military capabilities are at the disposal of the executive branch to use under the authorities granted to it in the US Constitution.

Over time, the executive branch has grown to include various departments, bureaus, and agencies. Among these that are important for the discussion in this monograph are the Departments of Defense, State, Treasury and the Central Intelligence Agency (CIA). For this examination, a further explanation of the legal authorities to employ the capabilities of departments and agencies is required. The US Constitution authorizes the legislative branch to raise and support armies. It further states that no appropriation of money that shall be for a longer term than two years; to provide and maintain a Navy; make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the union. The legislative branch passes statutes to provide legal authority for the continued maintenance of the armed services. The statute for each department in the executive branch is where they receive the legal authorities to execute their functions are vested. Inside the Department of Defense are the Army, Navy and Air Force. The legislative branch has provided legal requirements and responsibilities for those organizations to prepare to protect and defend the United States, provide manpower, determine how the manpower is organized, determine how the their organization are equipped and so forth. The legislative branch explains those responsibilities and requirements in US Code (USC) Title X, which the legislative branch makes into Public Law (PL). The organizations within the State Department receive most of their authorities through Title XXII of the US Code. The Central Intelligence Agency receives most of their authorities through Title L of the US Code. Therefore, in order for those executive branch departments to accomplish the responsibilities and requirements from the legislative branch they request funds and appropriations citing their Title X, Title XXII or Title L requirements.

The authorities and funding for the executive branch's departments are important because it enables those departments to accomplish foreign policy objectives. For example, the State

Department may require forces from the Defense Department to assist in training a foreign government's army. The State Department uses authorities provided in US Code Title XXII to request funding from the legislative branch to accomplish this foreign policy objective. The Defense Department would provide an organization trained, manned and equipped for the operation. However, the State Department would pay for the operation with funds appropriated by the legislative branch justified by the authorities outlined in US Code Title XXII.

The authorities and funding the legislative branch provides to departments of the executive branch have evolved into one of the points of friction between the two branches over the development and execution of US foreign policy and its accompanying strategy. It is clear by the process that the legislative branch provides capabilities and means for the development of strategic aims to support foreign policy objectives through their delegation of authority and funding of the executive branch's departments through the US Code. The other point of friction involves Congress's ability to declare war, a method that strengthened precedent of their approval of the strategic way to employ the national capabilities in order to achieve foreign policy objectives. In a sense, separate authorities violate the time-honored Army commitment to unity of command. The next section briefly reviews how the US government, prior to World War II, used its authorities to employ military force. It then will survey changes in methods regarding the use military force after World War II.

Use of Military Force up to Vietnam

From 1898 until 1945, US foreign policy teetered between one of isolationism and interventionism. By the 1930s, isolationist sentiment was strong in Congress. Legislative branch leaders such as Senator Robert A. Taft (R-OH) and Senator Bennet Champ Clark (D-MO), championed the Neutrality Acts of 1935, 1937 and 1939. With the approach of war in Europe, the Franklin Delano Roosevelt's (FDR) administration, pushed for authorities to better prepare the United States for war. The first was to lend and lease old naval vessels and equipment to Great

Britain. The legislative branch passed the Lend Lease Act in order to authorize that transaction. This modified the previous legislation of the Neutrality Acts, which had prohibited the export of arms, ammunition and implements of war to belligerent countries.⁷ The second was the declaration of a state of emergency in 1939 after German forces invaded Poland.⁸ This authorized the FDR Administration to begin mobilization of the Army and Navy forces in preparation for WWII. Congress, while pro-isolationist, implicitly gave the consent and support to the administration's foreign policy to prepare the United States to intervene in World War II.

The legislative branch has the statutory authority to declare war and fund the endeavor. However, after World War II, the executive branch's authority over foreign policy grew in a way to be able to employ military force without approval of a congressional declaration or statute. This occurred to some extent during Theodor Roosevelt and Woodrow Wilson administrations. However, the scope and scale of use of military force, by the executive branch, without Congressional consent, exceeded those of executive administrations before World War II. The Korean War marks a notable example of the executive branch's ascendancy in foreign policy development and authorization to use military force without expressed declaration by the legislative branch.

During World War II, the US successfully waged a war premised on a policy of unconditional surrender. This involved mobilization of all national resources and capabilities, such as industry, technology, and population to support the direction of total war from 1941-1945. World War II, concluded with the capitulation of Germany and the surrender of Japan after the US used two atomic bombs on the cities of Hiroshima and Nagasaki. A lasting peace proved elusive, however. The US reaction to the policies of its erstwhile wartime ally, the Soviet

⁷ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004), 73-74.

⁸ Fisher, *Presidential War Power*, 75.

Union, led not to a lasting peace, but what was dubbed a Cold War. The Cold War dominated international politics for much of the second half of the 20th Century. This challenged US foreign policy elites' conception of a strategy of total war to support US foreign policy. Within a few years of the conclusion of World War II, the destructive effects of nuclear weapons possessed by the United States and subsequently the Soviet Union necessitate the avoidance of a foreign policy, which could lead to total war. Limited war, or gradualism, became an alternative approach to foreign policy objectives in order to avoid the complete destruction of a nuclear war. Because of the dangers of total war, the authority to advise, develop and execute a strategy in support of foreign policy came under increased scrutiny of the legislative branch and the public it represents. Responding to perceived lessons of Pearl Harbor and wartime experience, the legislative branch enacted the 1947 National Security Act. The act influenced the process of advising, developing and executing military strategy with the greater purpose of effecting the development and execution of US foreign policy. The 1947 National Security Act had an impact on the development and execution of US foreign policy and its accompanying strategy in two ways.

First, it established a National Security Council (NSC) to advise the President. Its purpose is to discuss long-term problems, immediate national security crises and develop foreign policy. The NSC ideally accomplishes this by coordinating foreign policy materials from relevant executive branch departments. During the Truman and Eisenhower administrations, the NSC provided the synchronized intellectual capacity from all departments of the executive branch, to develop evolving foreign policies in order to deter and contain communism from becoming the globally accepted form of government over for the next fifty years.⁹ However, the NSC also serves to filter direct access to the President of the United States by the departments in the executive branch, thereby reducing their influence on strategy to support US foreign policy.

⁹ Russell Frank Weigley, *The American Way of War: History of United States Military Strategy and Policy* (New York: Macmillan, 1973), 379-381 & 401-402.

Second, the 1947 National Security Act established a Secretary of Defense superimposed on the traditional Secretaries of the Navy and War (Army) and the then newly established Secretary of the Air Force. The act brought the Secretaries of the Navy and War (Army) under one statutory advisor position (cabinet position) of the Department of Defense. This point is important because the Secretaries of the Department of the Navy and the Department of War (Army) throughout US history interacted directly with the executive branch in the development of strategy to support foreign policy. In addition, the legislative branch created the US Air Force as a third military service alongside the Navy and Army within the Department of Defense.¹⁰ The 1947 National Security Act did not end the long-standing rivalry between the Army and Navy. Indeed, creation of an additional service may have exacerbated matters. The traditional Army-Navy rivalry became a three-way competition for resources under the then newly established Secretary of Defense. In addition to competing with an entirely new executive branch department in the form of the CIA, with statutory advisor authority, they were required to participate in another level of coordination in the form of the NSC. All this occurred prior to being able to provide advice on the development of effective strategy in support of US foreign policy to the President of the United States. By 1949, all three service secretaries no longer sat on the NSC. So, the revised 1949 National Security Act had an unintended consequence of diluting the Army and Navy's ability to influence the development of strategy to support foreign policy. The NSC, CIA and the US Air Force become the primary agents of the executive branch, to champion the development of capabilities employed during the execution of a strategy of limited war, in an era where the US government no longer maintains a Department of War.

There were two authorities President Truman invoked to authorize the use of US military force in the Korean War. After WWII, the United States joined the United Nations (UN). The

¹⁰ "National Security Act of 1947", US Department of State: Office of the Historian, accessed January 8, 2016, <https://history.state.gov/milestones/1945-1952/national-security-act>.

membership in this organization obligated the United States to provide military force upon request, and “subject to ratification by the signatory states with their respective constitutional processes.”¹¹ In addition, it must be remembered that even though WWII ended in 1945 the state of emergency declared by President Roosevelt in 1938 remained in place until 1952.¹² When North Korean forces invaded South Korea in the summer of 1950, President Truman authorized the use of US military forces to fight against the invading North Koreans. He used the UN request for military force and the state of emergency powers, previously declared by the Roosevelt administration as the authorities to deploy military forces to combat.¹³ However, he did not seek the approval of the legislative branch through its constitutional processes, which the UN Charter Treaty specifically outlines.¹⁴ This was the beginning of the executive branch’s use of military force in an era of limited war for the United States.

The Truman administrations’ use of military force in Korea and the deployment of military forces to Europe in January 1951, in order to support the North Atlantic Treaty Organization (NATO), caused the legislative branch to weigh in on the ways and capabilities the executive branch employed to accomplish foreign policy. Senator Robert A. Taft (R-OH) explained the purpose of a series of hearings held by the US Senate Foreign Relations Committee, to discuss “inflated executive interpretations of the president’s power to send troops abroad pursuant to mutual security treaties.” Senator Taft “urged legislators to defend their prerogatives and arguing that constructive criticism from Congress on foreign policy is essential to the safety

¹¹ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004), 88.

¹² Louis Fisher, *Presidential War Power*, 80.

¹³ *Ibid.*, 83.

¹⁴ *Ibid.*, 85.

of the nation.”¹⁵ Secretary of State Dean Acheson when called to testify before the Senate Committee of Foreign Relations and Armed Services found the legislative branch’s focus on who possess the authority to use military force the executive branch as a means to influence US foreign policy “plainly annoying.”¹⁶ Acheson stated,

It seems to me that perhaps a little more is involved here, and that we are in a position in the world today where the argument as to who has the power to do this, that, or the other thing, is not exactly what is called for from America in this very critical hour, and if we could all agree on the fact that something should be done, we will perform a much greater role in the world, than by quarreling about who ought to do it.¹⁷

The debate ended with the passage of a non-binding Senate Resolution number ninety-nine (SR 99) stating “congressional approval should be obtained of any policy requiring the stationing of military forces abroad.”¹⁸ In addition, in June 1951, the legislative branch passed the Universal Military Training and Service Act, which continued the selective service system, referred to as the draft. The selective service system was previously implemented under the President Roosevelt’s 1938 Executive Order, which had declared a state of emergency. Secretary of Defense George C. Marshall recommended that the continuing ability to mobilize swiftly for another war on the scale of WWII was necessary.¹⁹ Passage of the Universal Military Training and Service Act was an expressed endorsement by the legislative branch of the executive’s branch preparation to use all US capabilities necessary to wage war as a way to accomplish foreign policy aims. This endorsement the executive branch’s recommendation to prepare to use all US capabilities necessary to wage war but rebuking aim to deploy of military forces to

¹⁵ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004), 112.

¹⁶ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004), 112.

¹⁷ Quoted in Fisher, *Presidential War Power*, 112.

¹⁸ *Ibid.*, 105, and 114.

¹⁹ Russell Frank Weigley, *The American Way of War: History of United States Military Strategy and Policy* (New York: Macmillan, 1973), 395.

accomplish foreign policy was the start of conflicting pattern. It was demonstrated by the legislative branch actions to influence foreign policy by providing support (passage of Universal Military Training and Service Act) and withdrawing support (S.R. 99) to the executive branch's "ways and means" to execute strategy in support of foreign policy.

Four actions by the legislative branch contributed to the further expansion of the executive branch's use of authority to use military force. The legislative branch began with the appropriations of \$75 million dollars for Southeast Asia in 1949. By 1954, the legislative branch appropriated an additional \$400 million for military assistance to South Vietnamese forces and the next year approved the 1955 Southeast Asia Treaty Organization.²⁰ In 1961, the legislative branch used its authority to pass Foreign Assistance Act of 1961. This authorized the State Department to use its appropriated funds, under Title XXII of the US Code, to pay for the employment of members of other executive branch departments, such as the Department of Defense and Central Intelligence Agency, to assist State Department personnel to accomplish their diplomatic missions. Under this Act, other executive branch agencies and departments were able to provide capabilities to support the State Departments diplomatic missions abroad until the legislative branch revised the act in 1974.²¹ However, before the revision and because of previous congressional appropriations, the executive branch authorized the deployment of over 18,000 US military personnel to South Vietnam by 1964.

In August 1964, US naval forces reported an unprovoked attack by North Vietnamese forces in the Gulf of Tonkin. President Johnson, citing the attack, asked the legislative branch for

²⁰ John F. Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress Over How America Goes to War* (New York: Macmillan, 1992), 81-82.

²¹ *Hearing before the Joint Session of Congress on Resolution Foreign Assistance Act of 1974*, Public Law 93-559, Foreign Assistance Act of 1974, 93d Cong., 1st Sess., December 30, 1974, section 1, accessed April 25, 2016, <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:SN03394:@@L&summ2=m&>.

broad authority to take all necessary steps, including the use of armed force, to assist any member or protocol state of the 1955 Southeast Asia Treaty that requested assistance in defense of its freedom.²² The legislative branch approved his request in the form of the Gulf of Tonkin Resolution. In addition to the Gulf of Tonkin Resolution the legislative branch authorized and appropriated a supplementary budget for the execution of military operations in South Vietnam. As previously mentioned, the legislative branch had already authorized the executive branch to use the Universal Military Training and Service Act to initiate a Selective Service system to provide capability to support the foreign policy in South Vietnam. The approval of the 1955 Southeast Asia Treaty Organization, the passage of the Foreign Assistance Act of 1961, the Gulf of Tonkin Resolution, supplemental budget appropriations and the continuance of the Universal Military Training and Service Act by the legislative branch were effectively endorsements of support for the executive branch's Vietnam War strategy to execute the foreign policy of containing the expansion of communism. Thus, these were further examples the legislative branch contributing to the expansion of executive branch's authority to use military force in support of foreign policy.

By 1968, the Johnson administration strategy in Vietnam had failed to resolve conflict. With the conclusion of the Tet Offensive, the US public and legislative branch no longer supported the Johnson administrations' use of force in Vietnam. In 1969, Richard Nixon succeeded Johnson as the US President. In 1970, the legislative branch asked the judicial branch to determine if the executive branch had the authority to use military force in Vietnam. It upheld the US District Court's decision in *Orland v Laird* that the executive branch has the authority to conduct operations in Indochina absent a declaration from the legislative branch. The Supreme

²² Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress Over How America Goes to War*, 83.

Court stated, “The reality of the collaborative action of the executive and legislative required by the Constitution has been present from the earliest stages through Congress appropriating the nation’s treasure and conscripting its manpower.”²³ The following year President Nixon authorized the invasion of Cambodia without asking Congress for authority. President Nixon cited three authorities for the invasion of Cambodia. First, the judicial branch ruled in the executive branch’s current authority to use military force in Vietnam. Second, the existing authorities in Article II, Section one of the US Constitution. Third, the existing authorizations and appropriations by the legislative branch under US Code Title X. The purpose of the invasion of Cambodia was to destroy communist strong holds that are supporting the North Vietnamese war effort in Vietnam. After years of debate about the use of military force in Vietnam, the Cambodian incursion marked the start of a steady onslaught of congressional restriction on executive branch’s authority to use military force.²⁴ The legislative branch started its ability to change the ways and means the executive branch had available in Southeast Asia.

The 1973 War Powers Resolution

By the early 1970s there was growing concern in the US public over the costly US involvement in the war in Vietnam. This took place alongside continued concern over the Cold War. According to the US Library of Congress history of the War Powers Resolution, “Questions arose as to the extent of the President's authority to employ US military forces abroad in hostile situations in support of foreign policy objectives, without a declaration of war by the legislative branch.”²⁵ In 1971, after the invasion of Cambodia, the legislative branch repealed the Gulf of

²³ John F. Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress Over How America Goes to War* (New York: Macmillan, 1992), 65.

²⁴ Lehman, *Making War: The 200-Year-Old Battle Between the President and Congress Over How America Goes to War*, 86-87.

²⁵ “War Powers,” US Library of Congress, accessed December 29, 2015, <https://www.loc.gov/law/help/war-powers.php>.

Tokin Resolution. In 1973, the legislative branch amended the Universal Military Training and Service Act (UMTSA) effectively bring to an end the draft of US citizens to serve in the US military. Also in 1973, the legislative branch passed the 1974 Defense Appropriations Bill forbidding the US government from spending funds in South Vietnam, Cambodia, Laos and Thailand without congressional approval. With these actions, the legislative branch exercised its authority ending the appropriations and withdrawing approval for the capability supporting the strategy. However, the legislative branch would attempt to take it one step further to ensure the legislative branch would continue to have a role in developing and approving foreign policy by placing a limitation not only on the means but also ways the executive branch's executes military strategy in support of foreign policy. This took the form of the 1973 War Powers Resolution (73WPR).

Three US Senators played an enormous role in the leadership of the US Senate during this time. They all belonged to the same party but had different views on the necessity of 73WPR. Senator Jacob K Javits (D-NY) sponsored the 73WPR. He was a keen supporter of the idea that “when the executive wishes to come to a decision about a given matter he shall consult with Congress as to what the decision should be, and take into account what the Congress believes should be the decision before it is made.”²⁶

Senator Mike Mansfield (D-MT) was the Senate Majority Leader at the time of the passage of the 73WPR. He was against the war in Vietnam and his leadership in the US Senate set the conditions for the passage of the 73WPR. According to his biographer Don Oberdorfer, “As Richard Nixon continued to pursue an unpopular war in his first term of office, Congress

²⁶ *Hearing before US House. Committee on International Relations. Subcommittee on International Security and Scientific Affairs.* H381-56 War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation of Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident. 94th Cong., 1st Sess. May 7 and June 4, 1975, 61.

became increasingly resistant, as reflected in the Senate approval of the series of Mansfield amendments in 1971-1972.”²⁷ Senator J. William Fulbright (D-AR) was the chair of the Senate Foreign Relations Committee. He too was against the Vietnam War. According to his biographer Randall Bennett Woods, “Jacob Javits’ s bill gave the president far too much latitude to involve the United States in foreign conflicts...In Fulbright’s opinion the Constitution bound the president to ask for and secure a declaration of war, or at the very least congressional approval...before sending troops abroad.”²⁸ Senator Fulbright submitted amendments to strengthen the 73WPR, but all were defeated including one concerning CIA covert activities.²⁹ Senator Fulbright voted for the Senate version of the 73WPR and worked with Representative Clement Zablocki (D-PA) to ensure the passage of the 73WPR. After the passage of the 73WPR, Senator Mansfield and Senator Javits provided necessary leadership through the 1970s, to ensure the 73WPR requirements were adhered to by the executive branch and enforced by the legislative branch.

The passage of the 73WPR by the legislative branch required two-thirds of its members since President Nixon vetoed the law when it came across his desk. According to Louis Fisher, there has been an erosion of the legislative branch’s ability to exercise the authority to declare war since the beginning of the 20th century. Presidents have repeatedly employed the military without congressional authorization. While the legislative branch has the statutory authority to declare and fund war, the executive branch over time used executive orders in a way to be able to employ military force. The legislative branch enacted effective legislation as method to regulate the executive branch employment of military force. The 73WPR was the legislative branch’s

²⁷ Don Oberdorfer, *Senator Mansfield: The Extraordinary Life of a Great American Statesman and Diplomat* (Washington, DC: Smithsonian, 2003), 434.

²⁸ Randall Bennett Woods, *Fulbright: A Biography* (New York: Cambridge, 1995), 639.

²⁹ Woods, *Fulbright: A Biography*, 639.

method to use its authority exercised through the creation of statutes, codes and public laws to ensure their influence on the development of foreign policy. In the end, the executive branch's departments and agencies of government still require a statutory authority to execute their mission. Thus, executive orders can serve for initial employment of military force as a way to serve a strategy. However, legally the government departments and agencies require statutory authority to continue their employment of military force. Regardless of a declaration of war or an executive order, the military needs statutory authorization to continue the use of military force, some of which are provided under the US Code Title X.³⁰ The 73WPR makes the argument that executive orders are a limited source of authority and congressional authority is the primary authorization that is to be sought. Therefore, the oversight of the executive branch's authorization to use military force, through the 73WPR, became the legislative branch's mechanism to ensure they have a role in developing foreign policy.

The intent of the 73WPR was fourfold. First, it was to "insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities."³¹ Second, it was a mechanism to require the executive branch to consult with the legislative branch on the use of military force before its implementation. Third, it was a mechanism of required status reports to ensure the executive branch maintained consultation with the legislative branch. Finally, the 73WPR requires the legislative branch's judgement whether to cease, continue or defer the use of military force for a given conflict within sixty-days of the executive branch's use of military force. The 73WPR provided the legislative branch with a mechanism to have influence over US foreign policy by requiring executive branch

³⁰ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004), 26.

³¹ *Hearing before the Joint Session of Congress on Resolution Concerning the War Powers of Congress and the President*, Public Law 93-149, War Powers Resolution, 93d Cong., 1st Sess., November 7, 1973, Section 1.

consultation, with the insinuation they can withdraw or withhold the means for the executive branch to continue the employment of military force. This caused the executive branch to limit their options on foreign policy, strategy and capabilities required when considering the use of military force in order to limit the legislative branch's influence on the execution of foreign policy. The executive branch considered pre-existing authorities in the US Constitution or public law passed by the legislative branch to employ military force without prior approval or consultation with the legislative branch. Effectively, the 73 WPR serves a constraint on the US government's ability to consider all the options about foreign policy and strategy.

Since the end of WWII, the executive branch use of military force under existing constitutional authorities, effectively embracing a policy of limited war, explains a trend why the US government does not pursue a declaration of war from the legislative branch. Furthermore, the legislative branch created the 73WPR with the intent that both the legislative and executive branch would exercise combined judgement in the authorization to use military force. Citing the 73WPR Section Two C, "The constitutional powers of the President as Commander-in-Chief to introduce US Armed forces into hostilities...are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, (3) or a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."³² This is the legislative branches measure to regulate when the executive branch needs to consider their judgment in using military force. An examination of twelve cases in which the US government employed military force since the passage of the 73WPR reveals a pattern of waxing and waning legislative branch influence over the use of military force. The 73WPR has the unintended consequence of causing both branches of the US government to focus too much on the authority to use military force

³² *Hearing before the Joint Session of Congress on Resolution Concerning the War Powers of Congress and the President*, Public Law 93-149, War Powers Resolution, 93d Cong., 1st Sess., November 7, 1973, Section 2c.

rather than an effective strategy and foreign policy for the use of force. Therefore, in a case of a national emergency created by an attack upon the United States, the lessons of employing force, such as in years before World War II, are not considered. Because the 73WPR has focused the debate between the two branches on the authorities to use force not the strategy and policy required to prevail in a national emergency.

The 73WPR focus on the legal authority to use military force provided the legislative branch with initial influence on the executive branch's use of military force. However, the enforcement of requirements of the 73 WPR caused the executive branch to use existing authorities to legally use military force. This tactic once again limits the legislative branch's ability to influence the executive branch's use of military force. In addition, the legislative branch, by executing its constitutional responsibilities, authorized and appropriated additional US military capabilities. These actions further enabled the executive branch's ability to legally employ military force, at the same time reducing the legislative branch's influence even more. By 2003, the 73WPR no longer functioned as a mechanism for the legislative branch to have influence over the executive branch's use of military force.

The Use of Military Force Since 1973

Several examples of thirty-six times the US government used military force from 1973-2003 are explained below. The purpose is to identify the impacts of the 73WPR's role influencing foreign policy and strategy in these examples. Of the thirty-six times the US government used force twelve specific cases are examined. The other twenty-four cases where US military force was used, sometimes it was used in a nature not related to limited or total war. Some examples of those cases are the three evacuations of US personnel and foreign nationals from South Vietnam

and Cambodia in 1975.³³ While the remaining times US military force were used contribute to examples of precedence established, which are cited in reference to the current twelve case studies. Within a few years of the initial passage of the 73WPR there were four cases where its requirements provided the legislative branch with considerable influence over the executive branch's ability to use military force. Those events are the US Foreign Military Assistance to Angola in 1976, the war between Ethiopia and Somalia in 1978, the US involvement in El Salvador from 1978-1982, and the use of US military force in Lebanon in 1983.

The first case involved Ford administration's final confrontation with the legislative branch over a potential use of military force in Angola. It was an early demonstration of the legislative branch's assertiveness after the passage of the 73WPR. In January 1975, Portugal dissolved its colonial empire and declared Angola would become independent on November 11, 1975. Soon three independence movements, the Popular Movement for the Liberation of Angola (MPLA), the National Union for the Total Independence of Angola (UNITA) and the National Front for the Liberation of Angola (FNLA) began to fight amongst themselves for the government of Angola. The US provided support to the FNLA while the Soviet Union and Cuba provided support of the MPLA. The Ford administration used funds, previously appropriated by Congress but not obligated, for the CIA and Defense Department to ship arms, armored cars and anti-tank missiles to the MPLA in Angola.³⁴ As the situation developed, more funding was required since the remainder of the CIA Contingency Funds were obligated for 1976. The Ford administration requested more funds under the authority of the Arms Export Control Act (AECA). In US Senate Foreign Affairs Committee hearings, Congress voiced its concern "that

³³ Barbara Salazar Torreon, *Instances of Use of United States Armed Forces Abroad, 1798-2015* (Washington, DC: Congressional Research Service, 2015), 11.

³⁴ Walter S. Poole, *The Joint Chiefs of Staff and National Policy 1973-1976* (Washington, DC: Office of Joint History Office of the Chairman of the Joint Chiefs of Staff, 2015), 154.

the administration was using the ACEA as a means to get involved in the internal independence struggles in Angola moves to amend the ACEA. On 27 February the Clark amendment is passed prohibiting either the using or reprogramming funds for Angola.”³⁵

The Ford administration was limited in the military response it could provide in the wake of Vietnam. According to the Chairman of the Joint Chiefs of Staff (CJCS) General Brown “based on the projected military scenarios, we must also think about the will of Congress...If we send a ship people will recall the Gulf of Tonkin affair which led to the Senate resolution to deploy forces.”³⁶ Though the actions of the legislative branch to limit the employment of military force abroad, based on the experience in Vietnam, the Ford administration was unable to fund or authorize military force in Angola. While Secretary of State Henry Kissinger thought this was capitulation to a Soviet sponsored military adventure.³⁷ However, the result proved otherwise as Walter Poole pointed out, “Over the long run Angola proved a drain on Cuban and Soviet resources. The Cubans expedition force became more like an occupying army spread through the country its numbers exceeding 50,000 by 1983.”³⁸

The 73WPR indirect success in limiting presidential administrations employment of military force continued during the Carter administration. With the defection of Ethiopia, a longtime US ally, to the Soviet sphere of influence, in early 1978, the Carter administration looked at Somalia as a security providing partner for the Horn of Africa. Somalia, a one-time client state of Soviet Union, proved to be a difficult partner for the administration. Before the Carter administration would make agreements with Somali President Mohammed Said Barre, his

³⁵ Poole, *The Joint Chiefs of Staff and National Policy 1973-1976*, 154.

³⁶ *Ibid.*, 155.

³⁷ Walter Issacson, *Kissinger* (New York: Simon & Schuster, 1992), 623.

³⁸ Walter S. Poole, *The Joint Chiefs of Staff and National Policy 1977-1980* (Washington, DC: Office of Joint History Office of the Chairman of the Joint Chiefs of Staff, 2015), 156.

forces invaded Ogaden in Ethiopia. Ethiopia, with military support and assistance from the Soviet Union, quickly gained the advantage in the conflict. The Carter administration was concerned Ethiopia would take over the Somalia thereby increasing the Soviet Union's influence over the entire horn of Africa. The Carter administration considered authorizing military force in the means of an ad hoc aircraft carrier group. Joint Staff historian Walter S. Poole noted, "President Carter seriously doubted whether he could mobilize much support at home for an overt show of force or US intervention on Somalia's behalf. Congress he thought would react with horror."³⁹

By March 1979, the Soviet-backed Ethiopian offensive stopped at the border of Somalia. The Carter administration's concern of a Somalia collapse was averted without the use of military force. While the Carter administration never authorized the use of US military force, it is clear the oversight Congress exercised in the wake of the 73WPR and the Clark Amendment influenced the administration's foreign policy of deterring communism in the Horn of Africa. This crisis, However, also shed light on the lack of military options and capabilities the United States could provide to foreign policies in the Horn of Africa and the Middle East. The Carter administration endorsed and submitted to the legislative branch a Department of Defense initiative to create a Rapid Deployment Joint Task Force (RDJTF), which could provide capabilities for immediate employment of military force in the Southwest Asian Region.⁴⁰ Thus, while options for authorities to employ and fund military options did not exist for the Carter administration, the lack of actual military capability to act in the region was the contributing factor for the continued pattern of not employing military force.

The requirement to consult the legislative branch prior to the use of military force, as stated in the 73WPR, was ignored by two different administrations as the events in El Salvador

³⁹ Poole, *The Joint Chiefs of Staff and National Policy 1977-1980*, 99.

⁴⁰ Poole, *The Joint Chiefs of Staff and National Policy 1977-1980*, 36 and 40.

unfolded in the 1980s. The government of El Salvador faced a growing communist insurgency asked for US assistance in deterring communism. The Carter administration, using the Foreign Assistance Act of 1961 as authorization, sent US military advisors into El Salvador in order to assist the military-led government of El Salvador combat the Farabundo Martí National Liberation Front, a group of communist guerrillas. In 1981, the Carter administration uses the Arms Export Control Act (AECA) to fund providing arms and services to El Salvadorian government forces fighting communist guerrillas. On January 16, 1981 in the final days of the Carter administration, the US shipped arms and deployed US mobile training teams to El Salvador to counter a Communist-armed guerrilla offensive. The legislative branch was concerned because the executive branch never consulted them on the use of military force. After Carter administration left office, they admit to failing to inform the legislative branch under the Arms Export Control Act (AECA) provisions.⁴¹ The Reagan administration continued the with the Carter administration's foreign policy to support the El Salvadorian government. The Reagan administration contended since the use of military force was authorized under the previous administration, there was no requirement for further consultation with the legislative branch on any further involvement in El Salvador. The Reagan administration was supported by Comptroller General's report that determined the deployment of mobile training teams did not require a report to Congress under the 73WPR.⁴² The legislative branch again made further additions to the Clark Amendment to the Arms Export Control Act (AECA), providing further constraints and scrutiny on funding for US military operations in Latin America in the form of the

⁴¹ US General Accounting Office, Comptroller General, *Report to Senator Edward Zorinsky: Applicability of Certain US Laws that Pertain to US Military Involvement in El Salvador*, by Charles A Bowsheer (Washington DC: 1982), 10.

⁴² US General Accounting Office, Comptroller General, *Report to Senator Edward Zorinsky: Applicability of Certain US Laws that Pertain to US Military Involvement in El Salvador*, by Charles A Bowsheer (Washington DC: 1982), 11.

Glenn Amendment.⁴³ This led to increased friction between the legislative and executive branch on the authorization of the use of force and the ways and means the Reagan administration executed a foreign policy to deter communism.

The Reagan administration's involvement in Lebanon was a major test for congressional involvement in the oversight of the administration's use of military force and their acquiescence to an emerging Middle East foreign policy. The Reagan administration was concerned another Arab-Israeli War would occur because of a proxy war fought in Lebanon between Israeli and Syrian supported factions, in addition to the clashes between the Palestinian Liberation Organization and Israel. The invasion of Lebanon by Israel in June 1982 gave the Reagan administration a rationale to deploy US military forces as part of a multinational peacekeeping force to prevent an Arab-Israeli conflict. The President used the authorization under the commander in chief clause of the US Constitution. The initial deployment of US Marines was short and the US peacekeeping force withdrew without any US casualties. After the assassination of Lebanese President-elect Bashir Gemayel, President Reagan authorized the redeployment of US forces in order to prevent an escalating conflict between the Israelis' and Syrians' and their benefactor the Soviet Union.

The legislative branch became concerned and debated the Reagan administration's authorization to use military force with relation to the requirements in the 73WPR. The legislative branch was concerned with the policy of using US military force as a method to bring the warring sides to the negotiating table. Without significant movement in the peace talks, Congress passed Senate Joint Resolution 364 authorizing the deployment of forces to Lebanon for a period of eighteen months. Senate Joint Resolution 364 endorsed the Reagan administration's foreign

⁴³ US General Accounting Office, Comptroller General, *Report to Senator Edward Zorinsky: Applicability of Certain US Laws that Pertain to US Military Involvement in El Salvador*, by Charles A Bowsheer (Washington DC: 1982), 11-12.

policy, but for a limited time and with the possibility to change course. The Reagan administration saw this as a timeline for withdrawal and as a limitation to their strategy to bring the parties to negotiations. However, they foresaw that if more time was required at the end of the time stated in the resolution, Congress, would have to vote to alter the Senate Joint Resolution.⁴⁴ In foreshadowing a future event, Congress was primarily concerned the American public would require a peace settlement sooner than the eighteen months Congress was authorizing the Reagan administration. During the US House Committee on Foreign Affairs Congressional testimony for Senate Joint Resolution 364, Congressman Don Bonker (D-WA) discussed the public consensus needed for successful foreign policy, “Whenever the reports come back home about loss of life and more direct engagements of artillery involving US troops there then that issue is going to be elevated to a major controversy in this country.”⁴⁵ On October 23, 1983, suicide bombers attacked the barracks of the US and French contingents of the multinational force, killing 241 American service members in Beirut, Lebanon. Within a few months, President Reagan gave into pressure from within his administration, Congress and the US public and withdrew US forces from Lebanon. The DoD initiated the Long Commission to examine the security of the US military force when stationed abroad in peacekeeping operations. The Commission provided no definitive conclusions or recommendations as to those elements. Congress held hearings on the Long Commission results. The focus on the security procedures of the military force was the only thing examined.⁴⁶ There was no review of the strategy and foreign policy supporting the use of military

⁴⁴ *Hearing before the Committee on Foreign Affairs*, H381-94, Statutory Authorization Under the War Powers Resolution – Lebanon, 98th Cong., 1st Sess., September 21 & 22, 1983, 18.

⁴⁵ *Hearing before the Committee on Foreign Affairs*, H381-94, Statutory Authorization Under the War Powers Resolution – Lebanon, 98th Cong., 1st Sess., September 21 & 22, 1983, H381-94, *Hearing*, 14.

⁴⁶ US Department of Defense, *Report of the DOD commission on the International Airport Terrorist Act, 23 October 1983* 98th Cong., 1st Sess., (Washington, DC: 1983), accessed March 16, 2016, <https://fas.org/irp/threat/beirut-1983.pdf>, 1.

force in Lebanon. This would mark the start of a trend of diminishing legislative branch influence over the executive branch's use of military force.

There are four cases where the executive branch uses existing authorities to employ military force without having to inform the legislative branch as stated in the 73WPR. These cases are the 1975 Mayaguez Incident, involvement in Nicaragua, the 1986 Gulf of Sidra incident, and the 1986-1987 Persian Gulf "Tanker Wars." These cases are significant because they show the friction between the executive branch and the legislative branch over influence on US strategy and policy. The actions by the executive branch to use military force with existing authorizations to avoid the obligation of the 73WPR are evidence to support this claim.

Within eighteen months of passage of the 73WPR the legislative branch experienced the executive branch's ability to use military force by employing existing authorities, thereby excluding them from influencing foreign policy. In addition to the congressional constraints of 73WPR, the Ford administration inherited another congressional constraint placed on the executive branch. It was the 1974 Defense Appropriations Bill forbidding the funding of military operations in Vietnam, Cambodia and Laos. The intent of the congressional appropriations bill was to prevent the presidents from escalating or further engaging US forces in conflicts in the region by cutting off funds. However, within a year of its passage a crisis was developing on May 12, 1975. Cambodian forces hijacked the cargo ship *SS Mayaguez* and held its US crew. The Mayaguez Incident occurred in the final stage of a protracted and costly war in Vietnam leaving US reputation damaged and creating the perception of US weakness among allies and adversaries. In addition, the legacy of the seizure of the *USS Pueblo* by the North Koreans in 1968 continued to feed the narrative of United States weakness in the Pacific. A legislative branch, recently empowered with the passage of the 73WPR, required Presidential consultations on any use of military force where hostilities are imminent. The seizure of the *SS Mayaguez* endangered US citizens and further fed the narrative the United States was unable to meet security commitments

in the Pacific region.⁴⁷ Developing a strategy to counter the the above mentioned negative narrative threatening US foreign policy, while being required to consult with the legislative branch to use military force caused friction with the Ford administration.

With these factors in mind President Ford, using the precedent established in the recent evacuations of US citizens from Vietnam and Cambodia in the previous month, authorized reconnaissance missions of Cambodia and its territorial waters and islands to determine the location of the SS *Mayaguez* and placed US forces in the Pacific on alert. US Navy reconnaissance forces determined the location of the SS *Mayaguez* near the Cambodian island of Koh Tang. The reconnaissance yielded the information that the thirty-one US crewmembers were taken off the boat and moved to the Koh Tang Island. Several Cambodian patrol boats surrounding the SS *Mayaguez* fired and damaged the US reconnaissance aircraft. US diplomatic negotiations appeared to be going nowhere and the Cambodian Navy made several attempts to move the *Mayaguez* to a Cambodian port and continued to engage US military aircraft. On May 13, President Ford authorized US forces to seize the ship, bomb the Cambodian Navy, and strike the military airfield at Ream and other military targets in the area of Kompong Som. In the course of the attack on Koh Tang Island and the Cambodian Navy, the crew of the SS *Mayaguez* was released and the US Navy recovered them. At the end of the incident, the US destroyed four Cambodian patrol boats and damaged three. The US also destroyed the Cambodian military barracks, fuel depots and the runway at Ream. In addition, the US killed 30-40 Cambodian forces on Koh Tang. US forces recaptured the SS *Mayaguez* without incident. However, as a result of

⁴⁷ Rowland Evans and Robert Novak, "Retrieving the Mayaguez: It was pure Ford," *Washington Post*, May 19, 1975, accessed January 5, 2016, H381-51 Hearing, appendix, 124.

the assault on the Koh Tang Island, US casualties were fifteen killed in action (KIA), fifty wounded and three missing in action (MIA).⁴⁸

The legislative branch had three concerns about the Mayaguez incident. First, the legislative branch was upset because they were informed of the military action but not consulted for input prior to the authorization of the military action. Second, the legislative branch's attempted to limit the executive branch ability to use military force through the 1974 Defense Authorization Act was ineffective. The Ford administration used Defense of Department (DoD) funds previously authorized by the legislative branch, but not allocated to specific requirements. These funds were available for the DoD to spend on contingencies through reprogramming. The short in duration and limited resources required for the military involvement in the Mayaguez Incident negated the need to ask congress for additional funds to operate in Cambodia. Finally, some members in the legislative branch viewed the Ford administration's actions as attempt to reverse the growing strategic perception of US weakness in the Pacific. There was concern the Ford administration used military force as a broader foreign policy strategy to deter to North Korea, by demonstrating US resolve to reject the rule of proportionality in favor of a higher degree American counterforce in the event of potential military crisis concerning the Korean Peninsula.⁴⁹ The inability to influence the Ford administration's foreign policy rankled part of Congress.

After the Ford administration, there were several cases where the executive branch used existing authorities to use military force without having to consult with the legislative branch as required in the 73WPR. Military involvement in Nicaragua, US naval operations in the Gulf of

⁴⁸ *Hearing before US House Committee on International Relations, Subcommittee on International Political and Military Affairs*, H381-51, Seizure of the Mayaguez Incident, 94th Cong., 1st Sess. May 14 and 15, 1975, 104.

⁴⁹ Rowland Evans and Robert Novak, "Retrieving the Mayaguez: It was pure Ford," *Washington Post*, May 19, 1975, accessed January 5, 2016, H381-56 Hearing, Appendix, 124.

Sidra and the Persian Gulf are three examples. The case of US military involvement in Nicaragua occurring a few years after the SS Mayaguez incident continues to explain how both the Carter and the Reagan administrations ignored the 73WPR requirements because of what they perceived as existing authorities for the executive branch to use military force.

On June 12, 1979, the Somoza government of Nicaragua was in jeopardy of a take over from the procommunist Sandinistas government. President Carter authorized US military forces to conduct the evacuation of US civilians from Nicaragua. 1,423 US civilians were evacuated without incident and little debate is conducted in Congress on the use of military force, unlike the previous evacuation of US citizens from Southeast Asia in 1975.⁵⁰ By the summer of 1979, the once friendly Nicaraguan government was overthrown by the Sandinista government in Nicaragua, which adopted a Marxist ideology. In 1981, the Reagan administration authorized a covert war in Nicaragua. By using the authorities in the Intelligence Authorization Act and the Arms Export Control Act, the administration was able to authorize covert action, by sending arms, direction in their support to anti-communist guerrillas based in El Salvador. Reagan administration support for the anti-Nicaraguan government rebels, called the Contras, was a way to undermine the communist Sandinista government in Nicaragua. Congress was upset at the Reagan administration activity. The legislative branch passed the Boland Amendment as a way to restrict the Reagan administration from using funds to support actions in El Salvador and Nicaragua. In addition, Congress passed the Intelligence Authorization Act in 1983 which included a clause, "To prohibit United States support for military and paramilitary operations and to authorize assistance; to be openly provided to governments of countries in Central America; to interdict the supply of military equipment from Nicaragua and Cuba to individuals, groups,

⁵⁰ Walter S. Poole, *The Joint Chiefs of Staff and National Policy 1977-1980* (Washington, DC: Office of Joint History Office of the Chairman of the Joint Chiefs of Staff, 2015), 133.

organizations or movement seeking to overthrow governments of countries in Central America.”⁵¹ The intent was to end covert operations and bring out into the open the support to overthrow the Sandinistas of Nicaragua to provide arms to the rebels in El Salvador.

The majority of Congress was concerned that the Reagan administration was exceeding its authority by conducting covert paramilitary operation in Nicaragua. The spectre of gradualism analogous to Vietnam occurred to many in Congress and the chance the conflict could expand US involvement.⁵² The minority of Congress was concerned that their intervention would limit the Reagan administration’s ability to conduct its anti-communist deterrence policy in Central America. In addition, the Boland Amendment, ended covert operations by granting the authorization for the Reagan administration provide open support to anti-communist governments in Central America. Congressman George W. Crockett, Jr (D-MI) was concerned this authorization by the legislative branch, through the Boland Amendment, provided the executive branch with “expressed consent from congress of what amounts to a declaration of war on other governments in Central America.”⁵³

Congress successfully used the Boland Amendment to stop appropriations for the Reagan administration to use 9,000 personnel to conduct covert operations to overthrow the communist government in Nicaragua. However, this did not cause the Reagan administration to halt its foreign policy to fight of communism in Latin America as the Ford administration in Angola. The Reagan administration sought other means besides using military force to authorize and fund the

⁵¹ *Hearing before the US House Committee on Foreign Affairs*, H381-80, Concerning US Military and Paramilitary Operations in Nicaragua, 98th Cong., 1st Sess. May 18, June 6 and 7, 1983, 1.

⁵² *Hearing before the US House Committee on Foreign Affairs*, H381-80, Concerning US Military and Paramilitary Operations in Nicaragua, 98th Cong., 1st Sess. May 18, June 6 and 7, 1983, 56.

⁵³ *Hearing before the US House Committee on Foreign Affairs*, H381-80, Concerning US Military and Paramilitary Operations in Nicaragua, 98th Cong., 1st Sess. May 18, June 6 and 7, 1983, 59.

deterrence of communism in Nicaragua. That attempt would later lead to a scandal-involving sale of US arms to Iran, which the proceeds went to fund the rebel, Contra forces. This attempt to circumvent the legislative branch would be known as the Iran-Contra Affair.

The trend of the executive branch using existing authorities began with the Mayaguez incident during the Ford administration. US military involvement in Nicaragua expanded the precedent, established by three presidential administrations, to use existing authorities to use military force without consulting the legislative branch. By 1986, the Reagan administration again used existing authorities to employ US military force as a means to achieve a new foreign policy of combating state sponsored terrorism in the Gulf of Sidra and Persian Gulf in 1986-1987. As in the previous mentioned cases, the executive branch did not consult the legislative branch prior to four separate uses of military force during operations in the Gulf of Sidra and Persian Gulf, as required under the 73WPR. The legislative branch held hearings to understand how the Reagan administration was able to authorize the use of military force. The Reagan administration argued the legislative branch already consented to the use of military force, because they authorized and appropriated funds to enable the continued global deployment of US military forces.⁵⁴ While executive branch use of this method of argument to authorize military force occurred in the late 1980s, the executive branch was employing authorities previously granted by the legislative branch as far back as the Ford administration.

The legislative branch began a trend in providing authorization to use military force to the executive branch soon occurred after the Mayaguez incident. Donald King and Arthur Leavings argued in a 1977 the division of all US military activity requiring congressional

⁵⁴ *Hearing before the US House Committee on Foreign Affairs, Subcommittee on Arms Control, International Security, and Science*, H381-61, War Powers, Libya, and State-Sponsored Terrorism, 99th Cong., 2d Sess. April 29, May 1 and 15, 1986, 210.

authorization can be distinguished by three types of authorization – express, implied and presumed.”⁵⁵ Through executing their constitutional responsibility of authorization and appropriation of additional military capabilities, requested by departments in the executive branch, the legislative branch provided implied consent and thus presumed authorization of authorities for the executive branch to use military force.⁵⁶ The executive branch argued prior consent of congress as stated in the King, Leavings argument negated the requirement to consult with the legislative branch prior to using military force.

Creation of additional military headquarters to command and control Special Forces, US military forces in the Persian Gulf region, and the Joint Rapid Deployment Task Force (JRDTF), along with the endorsement of capability to conduct “No-Fly Zones” by the legislative branch were a few examples. The planning and execution of the use of military force during Operation Eagle Claw, the failed attempt to rescue US hostages held by Iran, benefited from the existence of a rapid deployment headquarters.⁵⁷ The existence of the JRDTF provided the Carter administration with means to execute a rescue using military force, without the requirement of consulting the legislative branch. Lessons learned from Operation Eagle Claw led to the Joint Rapid Deployment Task Force Headquarters transforming in to an Army Corps Headquarters with a capability to conduct rapid deployment operations of conventional military forces. While it also created an additional permanent Joint Task Force Headquarters with Special Operations capability to cope with future terrorist incidents.⁵⁸ Operation Urgent Fury and Operation Just

⁵⁵ Donald E. King and Arthur B. Leavings, “Curbing the Dogs of War,” *Harvard International Law Journal* 18, 1, (Winter 1977), 56

⁵⁶ Donald E. King and Arthur B. Leavings, “Curbing the Dogs of War,” *Harvard International Law Journal* 18, 1, (Winter 1977), 69, 71-72.

⁵⁷ Walter S. Poole, *The Joint Chiefs of Staff and National Policy 1977-1980* (Washington, DC: Office of Joint History Office of the Chairman of the Joint Chiefs of Staff, 2015), 58.

⁵⁸ Poole, *The Joint Chiefs of Staff and National Policy 1977-1980*, 62-63.

Cause in Panama are two examples of how the Reagan and George H.W. Bush administrations used the Joint Task Force Headquarters capabilities appropriated by the legislative branch to conduct a rescue operation of US students in one case and apprehend a drug-dealing dictator wanted by US courts in the other case. Operation Desert Shield, Operation Restore Hope, the US military intervention in Bosnia-Herzegovina, and US military operations in Haiti are four cases, which demonstrate how the legislative branch enabled the executive branch with authorities and set further precedent for it to use military force without consulting the legislative branch. These cases set precedents for the executive branch's routine use of authorities to employ military force in Iraq, Kosovo, Afghanistan and Sudan, in the 1990s, without consulting the legislative branch under the requirements of the 73WPR.

The first important case study explaining how the legislative branch enabled the executive branch with authorities begins in 1990. The George H.W. Bush administration received legislative branch approval for Operation Desert Shield and Desert Storm after Saddam Hussain's Iraqi forces invaded Kuwait, in August 2nd 1990. Operation Desert Shield and Desert Storm became the Gulf War. President George H.W. Bush issued Executive Order 12722 declaring a national emergency under US Code Title L and thereby provides the authorization to deploy US military forces to deter an Iraqi attack on Saudi Arabia.⁵⁹ The legislative branch called for sanctions immediately after the invasion of Kuwait on 2 August 1990. The United States named the military Operation Desert Shield. On a 25 September 1990, during testimony to the Senate Foreign Relations Committee, US Secretary of State James Baker commented on the strategy's purpose, "To lead a global alliance, political alliance if you will, to isolate Iraq politically,

⁵⁹ George H.W. Bush, Executive Order 12722, "Blocking Iraqi Government Property and Prohibiting Transactions with Iraq," Gerhard Peters and John T. Woolley, *The American Presidency Project* (August 2, 1990) accessed February 2, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=23563>.

economically and militarily.”⁶⁰ Both executive and legislative branches were in agreement that the use of force was necessary.

On January 12, 1991, the legislative branch provided authorization, through a Joint Resolution, to President Bush for US military forces to conduct offensive operations to remove Iraqi forces from Kuwait.⁶¹ On January 17, 1991, the US shifted from a defensive operation and conducted offensive operations named Operation Desert Storm, to liberate Kuwait from Iraqi occupation. After over thirty days of aerial bombardment, the air campaign was followed by a ground invasion of Kuwait and southern Iraq on February 24, 1991. Within four days, US and Coalition forces secured Kuwait as Iraqi forces withdrew to southern Iraq. The Coalition forces ceased all hostilities with the liberation of Kuwait because of the strategic goals supporting their foreign policy. With the passage of UN Security Council Resolution 68 in April 1991 the Bush Administration imposed No-Fly Zones in Northern Iraq in order to reduce retaliation by Saddam Hussain against Kurdish populations indigenous to Iraq. The George H.W. Bush administration named these Operations Provide Comfort and Northern Watch. Later in 1991, they executed a similar operation in southern Iraq called Operation Southern Watch in order to reduce retaliation by Saddam Hussain against indigenous Shia populations. These operations lasted over ten years, spanning the George H.W. Bush, Bill Clinton and George W. Bush administrations.

The executive branch began a precedent of using Executive Orders during the George H.W. Bush administration. The Executive Orders were tied to the US Code passed into Public Law by the legislative branch. These Executive Orders legally authorize military force as a means

⁶⁰ *Hearing before the US Senate. Committee on Foreign Relations*, S. Hrg 101-1019, US Policy in the Persian Gulf, 101st Cong., 2d Sess. September 5, 20 and October 17, 1990, 9.

⁶¹ *Hearing before U.S. Senate, Committee on the Judiciary*, S. Hrg 102-183, *The Constitutional Roles of Congress and the President in Declaring and Waging War*: 102d Cong., 1st Sess. January 8, 1991, 2.

to accomplish the strategy in support of foreign policy goals during the Gulf War. Of specific importance are Executive Orders 12722 (August 2, 1990), Executive Order 12734 (November 14, 1990) and Executive Order 12771 (July 31, 1991). Executive Order 12722, declared a state of national emergency and authorized the military operation to build combat power to defend Saudi Arabia, known as Desert Shield. Executive Order 12734 authorized the Department of Defense to plan and execute offensive operations to liberate Kuwait, known as Operation Desert Storm.⁶²

H.W. Bush administration also issued Executive Orders to rescind some of its previous orders.

Executive Order 12771 officially rescinded Executive Order 12734 due to the successful expulsion of Iraqi occupation forces from Kuwait and the reinstatement of the lawful Government of Kuwait. However, Executive Order 12771 specifically stated, “This revocation shall not affect the national emergency declared in Executive Order No. 12722 to deal with the unusual and extraordinary threat to the national security and foreign policy of the United States posed by the policies and action of the Government of Iraq.”⁶³ This caveat provided the executive branch the legal authority to conduct military operations Provide Comfort, Northern Watch and Southern Watch as a means to support U.N. Security Council resolutions against Iraq. It also serves as a method to bypass the requirements in the 73WPR since the executive order was tied to authorization passed by the legislative branch in US Code.

In compliance with the 73 WPR the George H.W. Bush administration filed six reports with Congress from 1990 to 1992 and the Clinton administration filed one in August 1993 on developments concerning the national emergency with respect to Iraq. Following the successful

⁶² George H.W. Bush, Executive Order 12734, “National Emergency Construction Authority.” Gerhard Peters and John T. Woolley, *The American Presidency Project* (November 14, 1990), accessed February 2, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=23573>.

⁶³ George H.W. Bush, Executive Order 12771, “Revoking Earlier Orders With Respect to Kuwait.” Gerhard Peters and John T. Woolley, *The American Presidency Project* (July 25, 1991), accessed February 2, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=19837>.

conclusion of Operation Desert Shield and the legislative branch held several hearings on its outcome. However, Operations Northern Watch and Southern Watch continued for ten more years without reports required by the 73WPR. The failure to enforce this requirement lies with the legislative branch and it sets a precedent of limited to non-compliance to the 73WPR by the Clinton administration. Further contributing to the diminishing influence of the legislative branch over the executive branch's development of foreign policy. In addition the 73WPR unintended consequences caused the executive branch to primarily focus on authorities to use military force rather than first identifying which type of strategy and policy to pursue in order to wage war.

After the Gulf War, the George H.W. Bush administration's Executive Order 12722 remained in place to provide the authority to conduct military operations. These military operations included enforcement of No Fly Zones (Operations Northern and Southern Watch) as a means to support UN Security Council Resolutions against the government because of their threat to US National Security. UN Security Council resolution 681 (1991) declared Iraq shall unconditionally accept the destruction and removal of chemical, biological, and ballistic missiles by international supervision. Furthermore, Iraq shall not develop or acquire nuclear weapons or nuclear usable material. UN Security Council resolution 701 (1991) identifies the procedures for United Nations Special Commission on Iraq (UNSCOM) to conduct strict monitoring system to enforce compliance to resolution 681.⁶⁴

Due to the ongoing enforcement of Northern and Southern Watch, No Fly Zones became an established capability the military provided. The Clinton administration used them in conflicts such as Bosnia and Kosovo. The Gulf War also began the well-established precedent of using Executive Orders to employ capability and means without first having to consult with the legislative branch as stated in the 73WPR. This became further evidence of a loss of influence by

⁶⁴ David Schweigman and Kluwer Lawer, *The Authority of the Security Council Under Chapter VII of the UN Charter* (Netherlands, The Hague International, 2001), 75.

the legislative branch on the executive branch's use of military force. One of the final times the legislative branch was consulted prior to and during the use of military force was in the case of Operation Restore Hope in Somalia.

In the fall of 1992, a humanitarian crisis developed in Somalia. The George H.W. Bush administration sent military forces to provide security for aid workers attempting to solve the humanitarian crisis. The George H.W. Bush administration's rationale to use military force in Somalia in December 1992, was to assist the UN in support Security Resolution 794, which stated, "to provide security and humanitarian relief to Somalia." The authorities the George H.W. Bush administration used were the intent of legislative branch taken from US House Resolution 370 and US Senate Resolution 132 passed in the previous year. In addition, the executive branch cited comments made by the legislative branch while debating the Horn of Africa Public Security and Food Act Public Law 102-27 as a reason to intervene in Somalia. However, the legislative branch never specifically passed any resolution with the intent to authorize the use of military force.⁶⁵ Even though they also never confronted the George H.W. Bush administration on this oversight, thereby providing implied consent for the operation. The United States called this Operation Restore Hope. The United Nations called the mission UNOSOM, United Nations Operation in Somalia. US forces in conjunction with UN forces along with non-government aid agencies provided security and humanitarian support in order to relieve the famine affecting Somalia.

The Clinton administration inherited the operation in January 1993. By April 1993, the wide-spread famine in Somalia was under control. With the initial success of US military force providing security during the Somali humanitarian relief effort, the UN Security Council passed Resolution 814 to support the goal of reestablishing Somalia's economy, government, and

⁶⁵ Richard F. Grimmett, *War Powers Resolutions: After Thirty-Six Years* (Washington, DC: Congressional Research Service, 2010), 28.

society. The Clinton administration briefed Congress on the intent behind the change of military mission in Somalia. The Congress debated the Clinton administration's policy. US Senate Joint Resolution 45 approved it in May 1993.⁶⁶ Senate Joint Resolution 45 served as the executive branch's legal authority to the change in the mission for the US force to serve as a quick reaction force (QRF) for the UN peacekeeping mission. The Clinton administration immediately reduced the size of US forces from 25,000 to 5,000. UN forces from Pakistan, Italy and France replaced the US forces. The remaining US forces served as a quick reaction force (QRF) in support of the United Nations. The Clinton administration, with implied consent from the legislative branch, embarked in supporting the United Nations by supporting the goal of recreating Somalia's economy, government and society.⁶⁷ The new operation involved the US military in a peacekeeping role, was called UNOSOM II.⁶⁸ The attempt by the UN to recreate Somalia's government caused Somali warlord Farah Aideed to perceive the UN was attempting to get rid of him.⁶⁹

On June 5, 1993, Somali warlord Farah Aideed forces killed or wounded seventy-three Pakistanis peacekeepers. Only the efforts of Italian troops and the US quick reaction force averted worse casualties. At the request of the United Nations Secretary General Butros Butros Gahli, the Clinton administration authorized US forces to conduct operations to seize and capture Aideed in order to enforce the UN Security Council Resolution 837. UN Security Council Resolution 837

⁶⁶ "Somalia 1992-1993," US Department of State: Office of the Historian, accessed February 4, 2016, <https://history.state.gov/milestones/1993-2000/somalia>.

⁶⁷ *Hearings before the Joint session of US Congress Committee on Foreign Affairs*, S.J.R. 45, Authorizing the Use of US Armed Forces in Somalia, 103d Cong., 1st Sess. February 16, 1993. Appendix 4, 127.

⁶⁸ "Somalia 1992-1993," US Department of State: Office of the Historian, accessed February 4, 2016, <https://history.state.gov/milestones/1993-2000/somalia>.

⁶⁹ Dale R. Herspring, *The Pentagon and the Presidency: Civil-Military Relations from FDR to George W. Bush* (Lawrence: University Press of Kansas, 2004), 345.

called for, “the arrest and punishment of those responsible for the peacekeepers deaths.”⁷⁰ On 3-4 October 1993, during a raid to seize Aideed’s key leaders as many as 1,000 Somali’s were killed along with eighteen US killed in action and seventy-four wounded in action. The Clinton administration sent reinforcements but negative public reaction to the casualties caused a swift shift in US policy. The US legislative and executive branches agreed on a withdrawal date of March 31, 1994, for all US forces from Somalia.⁷¹

While both the George H.W. Bush and Clinton administrations adhered to the reporting requirements of the 73WPR, the legislative branch had several opportunities to publicly agree or disagree with both of their strategies to use military force in Somalia to support foreign policy. The George H.W. Bush administration employed authorities to use military force that were not tied to official US Public Law. The US Senate and US House both acknowledged the change in mission by the Clinton administration with the passage of Senate Joint Resolution 45. In addition, on July 29, 1993, the House Committee on Foreign Affairs holds hearing on the recent developments in Somalia. The Congress never recommended or made changes to to Senate Joint Resolution 45 based on the Clinton administration decision to use force in Somalia⁷² The legislative branch’s action or inaction provided implied consent for the executive branch to proceed with the use of military force in Somalia. After the deadly military engagement on October 3-4, 1993, the legislative branch attempted to require the Clinton administration, through legislation, to withdrawal US forces from Somalia by the authority granted under the 73WPR. The US Senate with consultation of the Clinton administration passed the Byrd Amendment,

⁷⁰ Herspring, *The Pentagon and the Presidency: Civil-Military Relations from FDR to George W. Bush*, 345.

⁷¹ *Ibid.*, 347.

⁷² *Hearings before the US House Committee on Foreign Affairs, Subcommittee on Africa*, H103-93, Recent Developments in Somalia, 103d Cong., 1st Sess. July 29, 1993. 8.

which called for the withdrawal of US forces from Somalia on 31 March 1994. This gave the administration up to 180 days to redeploy the US forces from Somalia. The US House of Representatives attempted to pass a resolution in line with the 73WPR requirements to have the forces withdrawn in sixty days, by January 1994.⁷³ Senator Tom Lantos (D-CA) was one of the members to object to the US House of Representatives attempt to force the executive branch to order a withdrawal of troops sooner than the Byrd Amendment. The Senator Lantos stated, “If you vote for this resolution you go way beyond Somalia. Somalia is not the issue. This is the signals that this nation sends out as we deal with the most important foreign policy matter of the post-cold war era, how do we build collective security?”⁷⁴ The efforts by the US House of Representatives did not succeed and the Byrd Amendment became the congressional authority requiring the Clinton administration to have all forces out by June of 1994. However, it should be noted that while the legislative branch did call for the return of all US military forces from Somalia they did previously have influence over and endorsed the Clinton administration’s foreign policy about the use of military force in Somalia. The concurrence by the legislative branch on Senate Joint Resolution 45 was proof. It was not until US forces took casualties that the executive and legislative branch examined the decision to use military force to support the foreign policy in Somalia. The decision by both branches to curtail the use of ground troops in Somalia led to a reliance on no fly zones as a mechanism to use existing military capability to enforce US foreign policy.

The Clinton administration used ground forces without prior Congressional consultation with the legislative branch in Haiti. This process began with the previous administration when in

⁷³ *Hearings before the US House Committee on Foreign Affairs*, H381-21, Withdrawal of US Forces from Somalia, 103d Cong, 1st Sess. November 3, 1993, 9-11.

⁷⁴ *Hearings before the US House Committee on Foreign Affairs*, H381-21, Withdrawal of US Forces from Somalia, 103d Cong, 1st Sess. November 3, 1993, 13.

October and November of 1991, President George H.W. Bush issued Executive Orders 12775 and 12779. Executive Order 12775 declared, “A national emergency to deal with the threat to national security, foreign policy and economy of the United States caused by events that had occurred in Haiti to disrupt the legitimate exercise of power by the democratically elected government of that country.”⁷⁵ Executive Order 12779 along with the April 7, 1992, Presidential Message informed Congress of the change in foreign policy and declared US economic and trade sanctions against Haiti. These actions by the George H.W. Bush Administration also supported UN Security Council Resolutions 841 and 843.⁷⁶ In June 1993, President Clinton issued Executive Order 12853, which extended sanctions on petroleum arms and financial transactions.⁷⁷ In addition, he extended the national emergency with respect to Haiti on September 30, 1993, before it automatically expired under the USC Title L authorities.⁷⁸ In November 1993, President Clinton reported to Congress on the status of sanction against Haiti and on the military deployment of six US navy vessels off Haiti’s shore to enforce United States sanctions and an Organization of American States embargo. The US Navy was part of a joint coalition of naval forces from Canada, France, Argentina, the Netherlands and the United Kingdom.⁷⁹ The US House of

⁷⁵ George H.W. Bush, Executive Order 12775, “Prohibiting Certain Transactions With Respect to Haiti,” Gerhard Peters and John T. Woolley, *The American Presidency Project*, (October 4, 1991), accessed February 4, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=20071>.

⁷⁶ Message from the President of the United States to the Committee on Foreign Affairs., Continuation of National Emergency with Respect to Haiti, 102nd Cong., 2d Sess., April 7, 1992 H. DOC 102-287, H380-11.

⁷⁷ William J. Clinton, Executive Order 12853, “Blocking Government of Haiti Property and Prohibiting Transactions with Haiti,” Gerhard Peters and John T. Woolley, *The American Presidency Project*, (June 30, 1993), accessed March 15, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=61548>.

⁷⁸ Message from the President of the United States to the Committee on Foreign Affairs, Continuation of National Emergency with Respect to Haiti, 103d Cong., 1st Sess. October 4, 1993 H. DOC 103-143.

⁷⁹ Message from the President of the United States to the Committee on Foreign Affairs,

Representatives held hearings in February 1994 on the foreign policy of using sanctions and embargo to force the reinstatement of the democratically elected President Jean-Bertrand Aristide. Testimony from several aid organizations described how the sanctions caused increased poverty and contributed to a growing humanitarian crisis while appearing not to effect the military government ruling Haiti.⁸⁰ The stage was set for the President to authorize military force on September 17, 1994 in order to overthrow the military government in Haiti and re-establish the ousted president and democracy. As it turned out, just the threat of US military force was required to return President Jean-Bertrand Aristide to power in Haiti. US military force was used to provide security along with coalition forces during a six month transition period lasting until mid-1995.

The US Senate Committee on Foreign Affairs, Subcommittee on the Western Hemisphere held a hearing on March 9, 1995, after the United States successfully brought President Aristide to power and restored his democratic government in Haiti. The Senate was focused on the implementation and costs of US foreign policy in Haiti. Chairman Paul Coverdell (R-GA) of the Subcommittee on Western Hemisphere and Peace Corps Affairs was concerned about the US foreign policy.⁸¹ However, the legislative branch did not exercise much influence on the use of military force and the accompanying foreign policy towards in Haiti during the Clinton administration.

Continuation of National Emergency with Respect to Haiti, 103d Cong., 1st Sess. November 15, 1993 H. DOC 103-165.

⁸⁰ *Hearing before the US House Committee on Foreign Affairs, Subcommittee on the Western Hemisphere*, H381-94, Humanitarian Relief Efforts in Haiti, 103d Cong., 2d Sess. February 9, 1994, 3-4.

⁸¹ *Hearing before the US Senate Committee on Foreign Affairs, Subcommittee on the Western Hemisphere*, S. Hrg 104-52, Implementation and Costs of US Policy in Haiti: Hearing, 104th Cong., 1st Sess., March 9, 1995, 2-3.

Another case of the executive branch using military force because of capabilities authorized and appropriated by the legislative branch is the 1993-1995 US military involvement in Bosnia-Herzegovina. With the fall of the Soviet Union, Yugoslavia began to fracture through several attempts by ethnic groups to leave the Yugoslav federation and form their own sovereign states. Croatia became an independent country on October 8, 1991. The former Yugoslavia became the Federal Republic of Yugoslavia dominated by ethnic Serbians. On March 3, 1992, Bosnia-Herzegovina declared its independence from the Federal Republic of Yugoslavia. In Bosnia-Herzegovina, there were three distinct ethnic groups, Muslim Bosnians, Croatian Bosnians and Serbian Bosnians. Long simmering tensions between these three ethnic groups devolved into a case of ethnic cleansing in a Bosna-Herzegovina. The Serbian Bosnians, supported by the Federal Republic of Yugoslavia, either were determined to take control of vast parts of Bosnia that were inhabited by Muslims, by forcing them to leave or by eliminated those who stayed.⁸² This crisis spanned the administrations of President George H.W. Bush and Bill Clinton. They both employed Executive Orders to authorize the use of military force as a means to support the foreign policy goals of peacefully resolving the conflict in Bosnia-Herzegovina.⁸³

President George H.W. Bush issued Executive Order 12808 on May 20, 1992, which declared a national emergency and blocked Yugoslav government property and property of the Governments of Serbia and Montenegro.⁸⁴ On June 5, 1992, President George H.W. Bush issued

⁸² Dale R. Herspring, *The Pentagon and the Presidency: Civil-Military Relations from FDR to George W. Bush* (Lawrence: University Press of Kansas, 2004), 354.

⁸³“The War in Bosnia 1992-1995,” US Department of State: Office of the Historian, accessed on March 23, 2016, <https://history.state.gov/milestones/1993-2000/bosnia>.

⁸⁴ George H.W. Bush, Executive Order 12808, “Blocking “Yugoslav Government” Property and Property of the Governments of Serbia and Montenegro,” Gerhard Peters and John T. Woolley, *The American Presidency Project*, (May 30, 1992) accessed on March 23, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=23628>.

Executive Order 12810, which initiated economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) in order to conform to UN Security Council Resolution 757.⁸⁵ On January 15, 1993, President George H.W. Bush issued Executive Order 12831, which called for additional economic sanctions against Yugoslavia.⁸⁶ On April 12, 1993, President Clinton informed Congress that he had deployed US Combat-equipped fighter aircraft, and supporting tanker aircraft to contribute to the United Nations effort to enforce a No Fly Zone in Bosnia-Herzegovina. President Clinton did submit a follow on report to Congress six months into the deployment of the aircraft. On 25 April 1993, President Clinton issued Executive Order 12846, which provided further sanctions on Bosnian Serbs because they failed to accept the Vance-Owen peace plan for Bosnia-Herzegovina.⁸⁷ In May 1993, President Clinton extended Executive Order 12808, which declared a national emergency regarding Yugoslavia and extended mandatory regulations prior its termination.⁸⁸ On October 14, 1993, US air power was deployed to enforce a No-Fly Zone and was crucial capability used as a threat to stop the war between Bosnian Serbs. It was not until after several atrocities committed by the Bosnian Serbs culminating in the massacre of Muslims in the city of Srebrenica that United States and NATO air

⁸⁵ George H.W. Bush, Executive Order 12810, "Blocking Property of and Prohibiting Transactions With the Federal Republic of Yugoslavia (Serbia and Montenegro)," Gerhard Peters and John T. Woolley, *The American Presidency Project*, (June 5, 1992), accessed on March 23, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=23630>.

⁸⁶ George H.W. Bush, Executive Order 12831, "Additional Measures with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro)," Gerhard Peters and John T. Woolley, *The American Presidency Project*, (January 15, 1993), accessed March 23, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=372>.

⁸⁷ Message from the President of the United States to the Committee on Foreign Affairs, Additional Measures with Respect to Federal Republic of Yugoslavia (Serbia and Montenegro), 103d Cong., 1st Sess. April 26, 1993 H. DOC 103-77, H381-18, 1.

⁸⁸ Message from the President of the United States to the Committee on Foreign Affairs. Continuation of National Emergency with Respect to Federal Republic of Yugoslavia (Serbia and Montenegro), 103d Cong., 1st Sess. May 30, 1993 H. DOC 103-91, 1.

strikes were carried out against on August 31, 1995.⁸⁹ On September 14, 1995, the Bosnian Serbs agreed to cease all offensive operations in the Sarajevo region. By 14 December 1995, the Dayton Peace Accords were signed giving forty-nine percent of Bosnia to the Serbs and the rest to the Muslim-Croat federation.⁹⁰

Precedence Set by Executive Branch Use of Military Force Since 1990.

These four cases explaining how the legislative branch enabled the executive branch with authorities set the precedent for the executive branch to use military force in Iraq, Kosovo, Sudan, and Afghanistan in the 1990s. As explained earlier, No-Fly Zones were authorized under National Emergency Executive Order 12722 issued by President George H.W. Bush. The legislative branch authorized and appropriated US Central Command Headquarters and the capability to conduct No Fly Zones during Operations Provide Comfort, Northern Watch and Southern Watch. Thus, during the Clinton Administration the executive branch had the authority to continue and expand the use of military force to conduct No Fly Zones in Iraq without prior consultations with the legislative branch.

President Clinton issued Executive Order 13119 on March 24, 1999, which declared Serbia and surrounding airspace and waters a combat zone.⁹¹ This continued the trend of employing executive orders as an authority to use of military force, by using the military capabilities to conduct No-Fly Zones in the Serbian province of Kosovo. Two additional Executive Orders issued by President Clinton required the use of military forces from the

⁸⁹ Dale R. Herspring, *The Pentagon and the Presidency: Civil-Military Relations from FDR to George W. Bush* (Lawrence: University Press of Kansas, 2004), 357-358.

⁹⁰ Herspring, *The Pentagon and the Presidency: Civil-Military Relations from FDR to George W. Bush*, 359.

⁹¹ William J Clinton, Executive Order 13119, "Designation of Federal Republic of Yugoslavia (Serbia/Montenegro), Albania, the Airspace Above, and Adjacent Waters as a Combat Zone," Gerhard Peters and John T. Woolley, *The American Presidency Project* (April 13, 1999), accessed on April 8, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=57399>.

Individual Ready Reserve (IRR). Because of decisions made by the Department of Defense, certain military capabilities normally in the active component were placed in the reserve component. As a result of enduring military operations, from the George H.W. Bush administration through the Clinton administration, existing military capability to support and execute those operations was limited and unable to meet all the requirements. Thus, a requirement to use existing military capability resident in the Reserve Components of the US Military was authorized by the Executive Orders of President Clinton.

During this time, there was an attempt by some members of Legislative branch to take President Clinton to court for violating the 73WPR. This was on the grounds that he did not consult with Congress prior to employing US military force in Kosovo. However, the Federal District Court for the District of Columbia ruled in favor of the President. The Supreme Court determined it would not hear the case. In the end, the precedent of Executive Orders and previous military capability authorized and appropriated by the legislative branch gave the executive branch the authority to use military force.

On 7 August 1998, members of the terrorist group Al Qaida bombed the United States embassies in Kenya and Tanzania. This resulted in the deaths 224 people (including twelve Americans) and injured 5,000 others. The members of Al Qaida linked to the attacks operated out of terrorist bases in Sudan and Afghanistan. Sudan and Afghanistan became the locations for the executive branch's next use of US military force in 1998 under Operation Infinite Reach. Authorization for this use of military force went back to January 23, 1995 when President Clinton issued Executive Order 12947. This prohibited transactions with terrorists who threaten to disrupt the Middle East peace process. This Executive Order gave the US Justice and Treasury Departments initial authority to apply sanctions and go after the prosecutions of individual

terrorists who threaten to disrupt the Middle East peace process.⁹² President Clinton issued Executive Order 13099 on August 20, 1998. This Executive Order specifically added Osama Bin Laden to Executive Order 12947. This action provided the legal authority for the US military to launch Operation Infinite Reach against Osama Bin Laden and his terrorist organization bases in Sudan and Afghanistan.⁹³ On August 20, 1998, US Navy vessels in the Arabian Sea fired cruise missiles beginning Operation Infinite Reach. Even though, most of them hit their intended targets, neither Osama Bin Laden nor any other terrorist leaders were killed.

Executive Order 13099 was the first time the executive branch specially identified an individual as a target in an executive order. However, it is not the first time the US government has specially targeted an individual in official correspondence. In 1815, President James Madison asked Congress for a declaration of war against the Dey of Algiers. His Barbary pirates continued to make warfare against US citizens trading in the Mediterranean, including taking some as captives. According to Louis Fisher,

Instead of a declaration, Congress passed legislation “For the protection of commerce of the United States against Algerian cruisers.” The first line of the statute read, “Whereas the Dey of Algiers, on the coast of Barbary, has commenced predatory warfare against the United States.”⁹⁴

This legislation by Congress provided the Madison administration with the authority to use military force against the Dey of Algiers and his pirates.

⁹² William J. Clinton, Executive Order 12947 “Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process,” Gerhard Peters and John T. Woolley, *The American Presidency Project* (January 23, 1995), accessed April 6, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=51612>.

⁹³ William J. Clinton, Executive Order 13099, “Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process,” Gerhard Peters and John T. Woolley, *The American Presidency Project* (August 20, 1998), accessed April 6, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=54808>.

⁹⁴ Louis Fisher, *Presidential War Power* (Lawrence: University Press of Kansas, 2004), 37.

Three months after Operation Infinite Reach, the US military executed Operation Desert Fox, another operation authorized by Executive Order. On December 16, 1998, the US Air Force and US Navy along with military forces from the United Kingdom conducted a three-day bombing campaign, which targeted suspected Iraq nuclear, chemical and biological sites which could potentially threaten US national interests. President Clinton authorized Operation Desert Fox without prior consultation with the legislative branch. The legislative branch was concerned with the executive branch's continuing precedence of conducting military operations in Kosovo, Afghanistan, Sudan and Iraq without adhering to the 73 WPR requirement of consultation prior to the use of military force. In addition, there was a growing concern that the Clinton administration used military force only to direct attention away from his scandalous behavior.⁹⁵ However, the legislative branch's previous appropriations and authorizations for the US Central Command Headquarters and the military capability to employ cruise missiles gave the administration capabilities to defend against threats to national interests. Congress did not take action as a legislative body or through the Supreme Court against the Clinton administration use of military force during Operation Desert Fox. The US House of Representatives, however, impeached President Clinton for perjury, misleading a Federal Grand Jury, and obstruction of justice due to his scandalous behavior with Monica Lewinsky.⁹⁶ Nevertheless, those measures did not pass the US Senate and President Clinton served out the remainder of his term.

One year into the George W. Bush administration, the Al Qaeda terrorist network conducted terrorist attacks on September 11, 2001. They used hijacked civilian aircraft and

⁹⁵ Dale R. Herspring, *The Pentagon and the Presidency: Civil-Military Relations from FDR to George W. Bush* (Lawrence: University Press of Kansas, 2004), 365.

⁹⁶ Alison Mitchell, "Impeachment: The Overview -- Clinton Impeached; He Faces A Senate Trial, 2d in History; Vows To Do Job Till Term's 'Last Hour'," *Washington Post*, December 20, 1998, accessed April 7, 2016, <http://www.nytimes.com/1998/12/20/us/impeachment-overview-clinton-impeached-he-faces-senate-trial-2d-history-vows-job.html?pagewanted=all>.

crashed them into the World Trade Center and Pentagon, killing over 3,000 US citizens. By November of 2001, the George W. Bush administration authorized the employment of military forces in Afghanistan. There were two goals: overthrow Afghanistan's government, which provided support for Al Qaeda terrorist bases in Afghanistan; and to capture or kill the leader of Al Qaeda, Osama Bin Laden. By December 2001, the US military forced the Taliban regime from Afghanistan. The US government hunt for Bin Laden continued as well as the mission to build a capable government in Afghanistan. This operation was called Operation Enduring Freedom (OEF).

President George W Bush issued three crucial Executive Orders after the September 11th terrorist attacks in order to provide authority for the use of military force. Executive Order 13223 (September 14, 2001) ordered the Ready Reserve of the Armed Forces to Active Duty and delegated certain authorities to the Secretary of Defense and the Secretary of Transportation.⁹⁷ Executive Order 13224 (September 23, 2001) officially identified Mohammed Omar and the Taliban as military targets.⁹⁸ Executive Order 13235 (November 16, 2001) declared a National Emergency under the Constitution and the laws of the United States of America, including the National Emergencies Act (US Code Title L). The Executive Order, "Declared a national emergency...that requires the use of the Armed Forces of the United States...because of the continuing and immediate threat to the national security of the United States or further terrorist

⁹⁷ George W. Bush, Executive Order 13223, "Ordering the Ready Reserve of the Armed Forces to Active Duty and Delegating Certain Authorities to the Secretary of Defense and the Secretary of Transportation," Gerhard Peters and John T. Woolley, *The American Presidency Project* (September 14, 2001), accessed April 7, 2016. <http://www.presidency.ucsb.edu/ws/index.php?pid=61L4>.

⁹⁸ George W. Bush, Executive Order 13224 "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten To Commit, or Support Terrorism," Gerhard Peters and John T. Woolley, *The American Presidency Project* (September 23, 2001), accessed April 7, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=61L5>.

attacks. To provide additional authority to the Department of Defense to respond to that threat, and in accordance with section 301 of the National Emergencies Act (L USC. 1631), I hereby order that the emergency construction authority at 10 USC. 2808 is invoked.”⁹⁹

Congress, after consultation by the president in accordance with the 73WPR, passed legislation supporting President George W. Bush’s use of military force. On September 18, 2001, the 107th Congress passed Senate Joint Resolution 23, which authorized the use of military forces against those responsible for the recent attacks against the United States.¹⁰⁰ This became Public Law 107-40 which provided official consent by the legislative branch for the executive branch to use military force. Public Law 107-40 is also known as the 2001 Authorization to Use Military Force (2001 AUMF). The 2001 AUMF stopped short of declaring war, however, which would have forced the US government to pursue a foreign policy and strategy that would break the cycle of limited war and prepare all national capabilities to wage war. The 2001 AUMF also serves as a continuing authority for any executive branch in the future to “use of the Armed Forces of the United States...because of the continuing and immediate threat to the national security of the United States or further terrorist attacks.”¹⁰¹ Whereas the act of declaring a war requires a national effort to develop a strategy with aims and policy goals to win and end the war. The 2001 AUMF just provides the executive branch with authorization to use military force, not an endorsement of strategy or policy.

⁹⁹ George W. Bush, Executive Order 13235, “National Emergency Construction Authority,” Gerhard Peters and John T. Woolley, *The American Presidency Project* (November 16, 2001), accessed April 7, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=61516>.

¹⁰⁰ *Hearing before US Senate. Committee on Foreign Relations*, S Hrg 107-40, Authorization for Use of Military Force (J.R.23), 107th Cong., 2nd Sess., 18 September 2001.

¹⁰¹ Quote from George W. Bush, Executive Order 13235, “National Emergency Construction Authority,” accessed April 7, 2016, <http://www.presidency.ucsb.edu/ws/index.php?pid=61516>.

After the Taliban were successfully removed from power in Afghanistan, the George W. Bush administration shifted its focus to Iraq's potential to deliver weapons of mass destruction. The administration did this based on Iraq's noncompliance with UN Security Council Resolutions 678 and 701, along with CIA intelligence estimates that Iraq was attempting to produce and acquire nuclear useable material. The administration's case to the UN argued Iraq posed a threat of international terrorism. On October 16, 2002, the US Congress passed Public Law 107-243, which authorized the use of military force against Iraq.¹⁰² Public Law 107-243, is also known as the 2002 Authorization to Use Military Force (2002 AUMF). The 2002 AUMF once again stopped short of declaring a war, but provided Congressional authorization for the President to use military force in defense of national interests. On March 20, 2003, President George W. Bush declared armed hostilities with Iraq. He initiated Operation Iraqi Freedom, an invasion of Iraq.

The method by which Operations Enduring Freedom, Iraqi Freedom and subsequent military operations, authorized in the 2001 or 2002 AUMFs, were funded is notable. The legislative branch authorized funding for major combat operations in a separate appropriation bill referred to as a supplemental funding bill. Ellen Hayes provides an outstanding overview of the history of the appropriation process for developing the US government's ability to create the federal budget in *Supplemental Appropriations in the 1990s Congress of the US*. The 1990 Budget Enforcement Act established statutory limits on discretionary spending to ensure legislation affecting spending was deficit-neutral. According to the 1985 Deficit Control Act, if legislation exceeds the deficit-neutral spending goals, the President must issue a sequestration of those funds in order to keep spending in support of the legislation, from exceeding the deficit – neutral spending goals. However, the 1990 Budget Enforcement Act provides congressional

¹⁰² US Public Law 107-243, 107th Cong., 2nd sess., October 16, 2002.

authorization, on a year-to-year basis, for a separate appropriation bill, called a supplemental appropriation bill, in the event it is determined previously passed legislation or bills will exceed deficit-neutral spending goals.¹⁰³

Precedent for Department of Defense funding of major combat operations using a supplement appropriation-funding bill started with the 1990-91 Gulf War. During the 1990s Congress authorized \$77.1 billion in supplement appropriation-funding bills for military operations. Congress authorized and appropriated \$51.4 billion for the 1990-91 Gulf War. However, the US government broke even on the 1990-91 Gulf War through reimbursement by participating nations. According to Ellen Hayes, “The 1990 Budget Enforcement Act stipulated that any funding intended for those operations in 1991 and beyond was automatically designated an emergency and not subject to new caps on spending.”¹⁰⁴ Thus, Congress through the 1990 Budget Enforcement Act provided the executive branch authority to use supplement appropriation funding bills to fund all military operations after the 1990-91 Gulf War. After the 1990-91 Gulf War, the legislative branch would call their separate appropriation bill the overseas contingency operations transfer fund (OCO). The legislative branch used OCO to fund unforeseen Department of Defense operations such as enforcement of no-fly zones, peacekeeping operations in Somalia, Haiti, Bosnia and military operations in Kosovo. The US government would not break even on those military operations, however. The OCO cost after the Gulf War of 1990-91 war \$25.7 billion. The most expensive year for OCO costs was 9.1 billion dollars in 1999.¹⁰⁵

¹⁰³ Ellen Hayes, *Supplemental Appropriations in the 1990s Congress of the US* (Washington, DC: Congressional Budget Office, 2001), 5, accessed, May 5, 2016 <https://babel.hathitrust.org/cgi/pt?id=pur1.32754070198100;view=1up;seq=2>

¹⁰⁴ Ellen Hayes, *Supplemental Appropriations in the 1990s Congress of the US*, 17-18.

¹⁰⁵ *Ibid.*, 17.

Thus, after the terrorist attacks on September 11, 2001, the legislative branch authorized and appropriated funds separate from the Federal budget using OCO to resource military operations in Afghanistan and Iraq. From 2000-2010 Congress authorized and appropriated \$514 billion in supplement appropriation-funding bills for military operations.¹⁰⁶ This use of the supplemental appropriation-funding bills provided the executive branch with enormous means to execute the military strategy in support of its foreign policy. In addition to the 2001 and 2002 AUMFs passed by Congress, the executive branch was enabled with the funding to develop and deploy new capabilities and the authority to use military force against any continuing and immediate threat to the national security of the United States or further terrorist attacks. The legislative branch had effectively rendered the requirements in 1973 War Powers Resolution obsolete.

Conclusion

The impact of 73 WPR caused the legislative and executive branches to seek legitimate authorities to employ military force to wage war in a limited nature instead of determining prudent strategy and considering all foreign policy options. At no time were there discussions in congressional records to consider understanding what prudent foreign policy or strategy to consider prior to the use of military force. These discussions would have led to determining the policy and then the strategy necessary to successfully wage the type of war which was understood by the legislative and executive branch. If the legislative branch's intent was to prevent war outright, then they demonstrated several successful uses of the 73WPR. Even with the passage of

¹⁰⁶Sharon L. Pickup. Overseas Contingency Operations: *Comparison of the Department of Defense's Overseas Contingency Operations Funding Requests for Fiscal Years 2010 and 2011* (Washington, DC: US Government Accountability Office), 8, accessed May 6, 2016, <http://www.gao.gov/assets/100/96896.pdf> .

73WPR into law, the executive branch still authorized the use military force to wage war of a limited nature. At times, the executive branch was enabled to do so by previous legislative branch authorizations. The stated intent of Section 2 (c) of the 73 WPR, however, was to “insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities.”¹⁰⁷ The collective judgement focused on which type and quantity of military capabilities available at the time of political crisis should be used along with the ensuring their employment meets statutory authorities. This focus by the legislative and executive branches on *capabilities* first was a result of the 73WPR. The focus caused three unintended consequences.

First, legislative branch authorization and appropriation to develop and acquire new military capabilities to counter potential threats to the national interests provided the executive branch further means to use military force under authorities granted in the Constitution. Examples of the use of military force from Operation Eagle Claw to Operation Iraqi Freedom illustrated how the executive branch used appropriated means by the legislative branch to legally authorize military force to wage limited wars. New military capabilities of significance included the creation of a Rapid Deployment Joint Task Force Headquarters, which provided the command and control structure to organize plan and execute military operations in a short time period by expeditionary means. Planning and employment of US military capabilities in Grenada, Panama, Operation Desert Shield, and Haiti are a few examples of this headquarters use. In addition, the creation of the US Central Command Headquarters provided the executive branch with capabilities to plan, prepare, and execute military operations in the Middle East. Operations Desert Shield/Storm, Provide Comfort, Northern Watch, Southern Watch, and Desert Fox were examples of how the executive branch employed congressionally approved and appropriated

¹⁰⁷ *Hearing before the Joint Session of Congress on Resolution Concerning the War Powers of Congress and the President*, Public Law 93-149, War Powers Resolution, 93d Cong., 1st Sess., November 7, 1973.

capabilities to plan, prepare and execute military operations. As Clausewitz explained, ‘The political object is the goal, war is the means of reaching it and the means can never be considered in isolation from their purposes.’¹⁰⁸ However, because of the 73 WPR, this became exactly opposite of what was intended of how the legislative branch and executive branch approached understanding the nature of war.

The second unintended consequence of the 73WPR was the development of a strategy that required mutually supporting political and military objectives as a pre-condition to the use of military force. As stated by General Rupert Smith in *The Utility of Force*, a common misinterpretation of Clausewitz’s second trinity is the failure to see policy and war as parallel activities and to assume they both have identical objectives whereas they are separate parts wholly related.¹⁰⁹ Bernard Brodie explained a rationale why Clausewitz dictum “War is merely a continuation of policy by other means” is forever neglected or rejected. Brodie contended, that “generals like to win decisively whatever contests they are engaged in, and do not like to be trammelled by a political authority imposing considerations that might modify that aim.”¹¹⁰ As a result the Weinberger and Powell doctrines were attempts that required the same goals for strategy and policy.

The Weinberger and Powell doctrines of 1980s-1990s are examples of attempts to harmonize policy and strategy to achieve the same outcome with the promise of using overwhelming force similar to a strategy of annihilation employed during the Second World War.

¹⁰⁸ Carl Von Clausewitz, *On War*, edited by Michael Howard, and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 87.

¹⁰⁹ Rupert Smith, *The Utility of Force: the Art of War in the Modern World* (London: Allen Lane, 2005), 60.

¹¹⁰ Carl Von Clausewitz, *On War* edited by Michael Howard, and Peter Paret, (Princeton, NJ: Princeton University Press, 1976), 645.

Hew Strachan explained the Weinberger and Powell doctrines as “all that is required for success is the establishment of clear aims and the provisions of overwhelming force to achieve those aims. As a theoretical requirement of policy, that is fair enough; as a statement about war’s true nature it is demonstrably false.”¹¹¹ This was illustrated with the mixed successes of military force in Grenada, Panama, Operation Desert Storm and Haiti. Overwhelming military force in three of those cases provided US military and foreign policy success and in Haiti’s case the threat of overwhelming force ensured the US foreign policy prevailed. However, three distinct military operations preceding Operation Desert Storm showed while the executive branch’s limited military objectives were achieved, a limited war continued for over a decade while US foreign policy goals remained unsatisfied. Twelve years later Operation Iraqi Freedom increased the scale of war for an equally longer period of time. The success of the military operation continued but their results failed to achieve US foreign policy goals. Because the military goals and foreign policy goals were the same, to create a self-governing Iraq by focusing on the elimination of anti-Iraqi government forces. The Weinberger and Powell doctrines caused the US government to view policy and military operations as having identical objectives. As a result, the nature of war was incorrectly understood from the beginning by treating the objectives of the military strategy and political objectives as the same. Thus, what appears as a case for a strategy of annihilation to use of overwhelming combat force in support of policy is but a compromise to wage limited war with the promise of mutually achievable political and strategic objectives. Therefore, the 73WPR limited the legislative branch and executive branch’s understanding and appreciation of how policy relates to the nature of war is necessary.

¹¹¹ Hew Strachan, *The Direction of War: Contemporary Strategy in Historical Perspective* (Cambridge: Cambridge University Press, 2013), 55.

Third, the legislative branch and executive branches' acceptance and reliance on the "all volunteer" military as the only means available to support ways and ends of foreign policy objectives eliminates mobilization and conscription of the US population as capabilities/means to support an alternative national/military strategy or foreign policy. Along with the passage of the 73WPR the legislative branch repealed the executive branch's ability to use the selective service or conscription in order to generate military capability in 1973. Andrew Bacevich recently explained the disadvantages of the All-Volunteer Force,

Today, the people have by-and-large tuned out war or accept it as someone else's concern. Meanwhile, the free hand allowed the national security establishment has encouraged the worst sort of mindless groupthink. Rather than replicating the errors of Vietnam, the All-Volunteer Force has fostered new ones, chief among them a collective abrogation of civic responsibility that underwrites sustained ¹¹²

Military capabilities resident in the Army Reserve Components were needed for conflicts as such as Operation Just Cause, Operation Desert Shield/Storm, Bosnia, Kosovo, OEF, and OIF.

However, at no time during the employment of military force from 1973 to 2003 did the legislative or executive branch consider mobilization or conscription as a capability to support the strategic ways of foreign policy objectives. This is in marked contrast to how both branches contemplated the possibility of mobilization prior to the 73WPR.

It appears the unintended consequences of 1973 War Powers Resolution limited the policy, strategic options, and tactical options available to the executive branch because of the resolutions' primary focus and on the executive branch's authorities to employ military force. Thus, the 73WPR has been a constraint on the US government's ability to consider the nature of war by diverting its attention and judgment to oversight rather than policy and strategy formulation. If the US government can exercise its judgment first to understand the nature of war,

¹¹² Andrew Bacevich, "Why America's All-Volunteer Force Fails to Win Wars," *Dallas Morning News*, April 18, 2016, accessed, April 26, 2016, <http://www.dallasnews.com/opinion/latest-columns/20160418-andrew-bacevich-why-americas-all-volunteer-force-fails-to-win-wars.ece>.

then it can better determine the foreign policy, strategy and authorities needed in order to effectively wage war. In conclusion, the 73WPR causes the legislative branch to focus on types of authorities to use military force rather than focus on all US foreign policy options, thereby limiting the US governments' ability to develop effective military strategy and further reducing the possibility of the US government express consent to declare and successfully wage war.

Further study on the use of mobilization and conscription as means to support strategy and foreign policy would be beneficial. An examination of the 1957 Army and Economic Mobilization Plans and Programs explains how the War Department became one of the principle agencies of the Government in administering as well as planning the nation's economic mobilization during WWII.¹¹³ A further study of Department of the Army pamphlet No. 20-212 explains it serves as a "swift explanation of previous mobilization events from 1775 through WWII. However, It is not clear to what extent this additional study on lessons learned after WWII through the Korea War up to present time has been followed up on."¹¹⁴ Another area for further consideration is an examination of the effects of Goldwater-Nichols Act has on strategy development. An examination of whether the Goldwater- Nichols Act provided Unified Commands a primacy in strategy development over The Joint Chiefs would also be beneficial. A final area requiring additional study is an examination of the Overseas Contingency Operations (OCO) funding authorities to use military force form 2003-2016. Further study on the effect OCO funding's has on foreign policy development and strategy development, may provide insight on how US political leaders and commanders exercise their judgement in considering the nature of war when political crisis call for the use of military force.

¹¹³ Elberton R Smith, *United States Army in World War II: The Army and Economic Mobilization* (Washington, DC: Department of the Army, 1957).

¹¹⁴ Marvin A. Kreidberg and Merton G. Henry, *Department of the Army Pamphlet 20-212: History of Military Mobilization in the United States* (Washington, DC: Department of the Army, 1955).

Appendix A

As stated on page three, Appendix A is the author's theory for understanding the nature of war. To summarize the nature of War equals Policy, strategy and the capability required for its support. This appendix will explain the types of components of the nature of war and how the 73WPR caused some of them to be ignored. This omission caused the US government to improperly identify and incorrectly understand the nature of war that it has faced.

Carl von Clausewitz wrote in *On War*, that "In war more than in any other subject we must begin by looking at the nature of the whole; for here more than anywhere else the part and the whole must always be thought of together."¹¹⁵ Further on in book one of *On War*, Clausewitz stated "The first, the supreme, the most far-reaching act of judgement that the statesman and commander have to make is to establish by that test the kind of war on which they are embarking; neither making it for, nor trying to turn it into, something that is alien to its nature."¹¹⁶ Thus, it is imperative first step for the government to understand the nature of war based on the situation in the present moment.

A commonly understood definition of war attributed to Clausewitz is "an act of force to compel our enemy to do our will."¹¹⁷ That definition serves to identify the overall goal of war but does not explain the necessary parts, which comprise the whole nature of war. To explain the parts of the nature of war as a whole Clausewitz uses an analogue of the Christian Trinity as his mechanism. While not specifically stated in this format, Clausewitz's trinity on war is well

¹¹⁵ Carl Von Clausewitz, *On War* edited by Michael Howard, and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 75.

¹¹⁶ Clausewitz, *On War*, 88.

¹¹⁷ Ibid., 75.

known as the government, military and the people.¹¹⁸ According to General Rupert Smith in *The Utility of Force*, “It is in my experience in both national and international operations that without all three elements of the trinity, state, military and the people, it is not possible to conduct a successful military option, especially not over time.”¹¹⁹ He goes on to further explain that Clausewitz has a second trinity where “policy has primacy,” which explains why military operations would not be successful over time. According to Clausewitz “When whole communities go to war - whole peoples, and especially civilized peoples-the reason always lies in some political situation, and the occasion is always due to some political object. War, therefore is an act of policy.”¹²⁰ General Smith explains a common misinterpretation of Clausewitz second trinity is the failure to see policy and war as parallel activities and to assume they both have identical objectives whereas they are separate parts wholly related.¹²¹ This leads some political leaders or generals to see strategy and policy as united in purpose in order to be effective. General Smith would state this is incorrect in understanding the nature of war and will have consequences. Thus, an understanding and appreciation of how policy relates, separate to strategy, to the nature of war is necessary.

Hew Strachan, in *The Direction of War*, offers the best interpretation of what Clausewitz defined as the nature of war. Strachan wrote, “Clausewitz saw war as a whole of which policy is but one part, it follows that the object in government is the harmonization of those parts.”¹²²

¹¹⁸ Carl Von Clausewitz, *On War* edited by Michael Howard, and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 89.

¹¹⁹ Rupert Smith, *The Utility of Force: The Art of War in the Modern World* (London: Allen Lane, 2005), 61.

¹²⁰ Carl Von Clausewitz, *On War* edited by Michael Howard, and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 86.

¹²¹ Smith, *The Utility of Force: The Art of War in the Modern World*, 60.

¹²² Hew Strachan, *The Direction of War: Contemporary Strategy in Historical*

Further, in the chapter he explains, “Policy therefore needs to be rooted in a recognition of war’s true nature.”¹²³ Strachan concluded that the “Clausewitz Trinitarian view of war that was made up not of people, army and government, but of tactics, strategy and policy – a construction that could be further developed in another ‘triad,’ that of means, aims and objectives.”¹²⁴ With the three parts of the whole nature of war identified as policy, strategy and tactics first, it is necessary to explain historic trends in US foreign policy, to understand how the United States has waged war. The origins and evolution of US foreign policy illustrate how overlapping authorities granted in the Constitution to the legislative and executive branches cause friction in the development of a strategy to execute the foreign policy. A brief explanation of American policy along with the historical background of its implementation is required.

Walter McDougall’s book *Promised Land, Crusader State: The American Encounter with the World since 1776*, provided a useful examination of American foreign policy. Walter McDougall pointed out that nowhere in the US Constitution is any branch delegated the authority to make or execute foreign policy. “The Framers of the Constitution were, for the most part, intensely practical men who were skeptical, even contemptuous, of abstract schemes of political theory...so they separated the powers to raise and command armies, to make and wage war.”¹²⁵ This rationale is further supported by James Madison in Federalist 51 “but the great security against a gradual concentration of the several powers in the same department, consists of giving to those who administer each department, the necessary constitutional means and personal

Perspective (Cambridge: Cambridge University Press, 2013), 59.

¹²³ Strachan, *The Direction of War: Contemporary Strategy in Historical Perspective*, 57.

¹²⁴ *Ibid.*, 58.

¹²⁵ Walter McDougall, *Promised Land, Crusader State: The American Encounter with the World since 1776* (Boston: Houghton Mifflin, 1997), 8.

motives, to resist encroachments of the others.”¹²⁶ This means that both branches need to work together in determining the ends, ways and means in devising a strategy to support the goals of foreign policy. However, they must not force the ways of strategy to be same as the goals of foreign policy. Walter McDougall’s theory on US foreign policy has merit, but it runs a course where it is binary in nature and can be easily attributed to the goal of either US political party. A more expansive theory on US foreign policy is required.

In the opinion of the author, the interpretation of US foreign policy, drawn from Walter R. Mead’s work, *Special Providence, American Foreign Policy and how it Changed the World*, is the correct way to explain how different types of US foreign policies in order to understand the various ways the United States has waged war. Mead uses four personality types based on Thomas Jefferson, Alexander Hamilton, Woodrow Wilson and Andrew Jackson to explain the four schools of thought on American Foreign policy. He asserted these schools have endured over the years and have in many parts been adopted by the two political parties as they adjust their political platforms. Jeffersonians are Constitutionalist and support liberty, Hamiltonians are for expanding free trade and support commercial and industrial policy, Wilsonians exercise administrative excellence in support of moral values. Mead explained, “Jacksonians believe that the government should do everything in its power to promote the well-being – political, moral and economic – of the middle class.”¹²⁷ Further examination will show they diverge, converge and overlap on sliding scales of degree on multiple areas of US policy, such as financial regulation, trade, immigration, domestic programs, international law and national security to name a few. For instance, Mead stated, Jacksonians have “a suspension of Wilsonian and Hamiltonian enthusiasm

¹²⁶ Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers*, ed. Garry Wills (New York: Bantam, 1982), 262.

¹²⁷ Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Knopf, 2001), 237-238.

for international law. In this they stand with the Jeffersonian, deeply suspicious of the “global meliorist” elements found in both Wilsonian and Hamiltonian foreign policy ideas.”¹²⁸

Nevertheless, Jacksonians are grouped with Hamiltonians as realists or hawks and Wilsonian and Jeffersonian are considered idealists or doves.¹²⁹ However, this theory examines the differences of opinion between the four schools of thought on how and when to go to war.

Jeffersonians see war as a last and very undesirable resort.¹³⁰ The avoidance of war is the first principle.¹³¹ Mead stated, “Hamiltonians believe national prosperity through an appropriate trade regime is the responsibility of the federal government” and will use war to defend those national interests.¹³² Mead explained that Wilsonians hold a universal “vision of a world of peaceful democracies treating one another with respect.”¹³³ Mead continued that, “Wilsonians hate war more on humanitarian grounds than on political grounds.”¹³⁴ Thus, Wilsonians and Hamiltonians are willing to consider war when humanitarian rights or national prosperity is threatened. However, their thinking is to limit the use of force to preserve human rights or restore national prosperity. As Mead put it, “For Jacksonians, either the stakes are important enough to fight for, in which case you fight with everything you have, or they aren’t important enough to fight for.”¹³⁵ Mead continues with, “Jacksonian opinion finds the use of limited force deeply

¹²⁸ Mead, *Special Providence: American Foreign Policy and How It Changed the World*, 244-245.

¹²⁹ *Ibid.*, 265.

¹³⁰ Walter Russell Mead, *Special Providence: American Foreign Policy and How It Changed the World* (New York: Knopf, 2001), 188.

¹³¹ Mead, *Special Providence: American Foreign Policy and How It Changed the World*, 190.

¹³² *Ibid.*, 110.

¹³³ *Ibid.*, 169.

¹³⁴ *Ibid.*, 189.

¹³⁵ *Ibid.*, 254.

repugnant, and considers the phrase “limited war” to be oxymoronic.”¹³⁶ Mead concluded that, “While the other three schools, for different reasons, embrace the idea of limits on both one’s objectives in war and the degree of force one is prepared to employ, Jacksonians see war as a switch that is either on or off.”¹³⁷ Thus, this theory shows the Jacksonian school of thought on US foreign policy is no longer considered nor implemented when statements are considering the nature of war. The 73 WPR is one of the direct contributors to this error.

Strategies, as previously suggested by Hew Strachan, are a part of the nature of war along with policy and tactics. Strategy in general can be thought of consisting of objectives, ways and means. Strategy comprises the way in which the policy achieves its objective. Thus, foreign policy requires a strategy in order to achieve its objectives. The necessity for a strategy reflects an opponent’s attempts to impede the ability to accomplish the overall course of action or method of the Foreign policy. When a conflict arises, a method to achieve a resolution is a negotiation. During the negotiations, the parties are in a state of diplomacy. If a resolution is unsuitable or not forthcoming, other methods can be employed to achieve a resolution, such as the use of force through nonviolent or violent or violent means. When a nation resorts to violence with another nation, a state of war exists.

Clausewitz stated, “The object of war is (a) to impose our will on the enemy, to do which (b) we use the means of maximum available force, with (c) the aim of rendering him powerless. We thus note at the outset the distinction between military aim and political objective.”¹³⁸ Therefore, to put it in the form of strategy the ways could be annihilation or attrition. The means

¹³⁶ Mead, *Special Providence: American Foreign Policy and How It Changed the World*, 254.

¹³⁷ Mead, *Special Providence: American Foreign Policy and How It Changed the World*, 254.

¹³⁸ Carl Von Clausewitz, *On War*, edited by Michael Howard, and Peter Paret (Princeton, NJ: Princeton University Press, 1976), 642.

is combat and the various capabilities to combat supports the aim to impose our will on the enemy. Therefore, the formulation of a strategy to support policy is important because war may be required to accomplish that policy. Carl von Clausewitz' theory of war as it relates to policy and strategy is employed throughout to judge the development and execution of the US government's foreign policy. To summarize one of his most popular maxims, policy is the end state where war is an extension of the policy as a means to achieve its goals.

In 1973, near the end of the Vietnam War, historian Russell F. Weigley concluded the American ways and means of war have stressed one of annihilation of the enemy's military power as opposed more recently, to attrition, exhaustion or erosion of an enemy's military power.¹³⁹ He cited German historian Hans Delbruck's insight on Germany's performance during World War One and how an initial way to accomplish their military strategy of annihilation evolved into one of attrition because military objectives over-ruled policy objectives.¹⁴⁰ Weigley's thesis is an important framework for this examination since it reflects the general mood of the country and its representatives in government at the time of the passage of the 1973 War Powers Resolution. It will be shown just as Jacksonian foreign policy is not considered after the passage of the 73WPR, neither was the strategy of annihilation.

The third part of the nature of war is tactics. Hew Strachan pointed out that tactics comprise the means, capabilities and the depth or capacity to which a nation has them in abundance. Tactics, means or capabilities enable the way(strategy) to accomplish the objective (foreign policy) and in the end meet the requirement of understanding the correct nature of the war the statesman and commander have chosen. Tactics, means or capabilities are developed as

¹³⁹ Russell Frank Weigley, *The American Way of War: History of United States Military Strategy and Policy* (New York: Macmillan, 1973), xxii.

¹⁴⁰ Edward Mead Earl with the Collaboration of Gordon A. Craig and Felix Gilbert, eds. *Makers of Modern Strategy; Military Thought from Machiavelli to Hitler* (Princeton: Princeton University Press, 1971), Chapter 12.

requests of executive branch to the legislative branch. The legislative branch using the powers granted in the constitution appropriates and authorizes the means to execute the tactics the executive branch requested. The monograph examined the types of tactics, means or capabilities the executive branch requested from the legislative branch from 1973-2003. It showed that both branches did not consider all the strategic ways or policy goals available. The 73 WPR limited the US government's ability to consider all foreign policy and strategy options due to its focus on authorizing capabilities to wage war. Thus, this theory illustrated how the 73 WPR limited the United States ability to examine all foreign policy options and strategy to wage war successfully.

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